ENVIRONMENTAL COMMISSIONER OF ONTARIO

2003-2004 Annual Report

CHOOSING OUR LEGACY

Supplement

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ABBREVIATIONS

Terms & Titles
AFP Agreement Forest Program
ALHB Asian long-horned beetle
AOC Area of Concern
BBPP Blue Box Program Plan
C of A Certificate of Approval
CAR Compliance Assessment Report
CCAT Catholic Cemeteries Archdiocese of Toronto
CCME Canadian Council of Ministers of the Environment
CELA Canadian Environmental Law Association
CFCs Chlorofluorocarbons
CFIA Canadian Food Inspection Agency
Class EA Class Environmental Assessment
CPAWS Canadian Parks and Wilderness Society
CSC Community Stakeholder Committee
CWD Chronic Wasting Disease
CWQG Canadian Water Quality Guidelines
CWS Canada-wide Standard
dBA A-weighted decibel
DWSR Drinking Water Systems Regulation
ECO Environmental Commissioner of Ontario
ECS Emission Control System
ENG Ministry of Energy
EPR Environmental Protection Requirements
ERT Environmental Review Tribunal
FHAG Fisheries Habitat Advisory Group
FMP Forest Management Plan
FMPM Forest Management Planning Manual
GAC Government Agency Committee
GHGs Greenhouse gases
IC&I Industrial, commercial and institutional
IFAPP Independent Forest Audit Process and Protocol
IMO Independent Electricity Market Operator
LC Landowners Committee
LDC Local distributing company
MBS Management Board Secretariat
MCBS Ministry of Consumer and Business Services
MF Management Forest
MFTIP Managed Forest Tax Incentive Program
MISA Municipal Industrial Strategy for Abatement
MNDM Ministry of Northern Development and Mines
MNR Ministry of Natural Resources
MOE Ministry of the Environment
MOF Ministry of Finance
MPAC Municipal Property Assessment Corporation
MTO Ministry of Transportation
NH_4^+ Ammonium
NMP Nutrient Management Plan
NMS Nutrient Management Strategy
NO_3^- Nitrate
NO_x Oxides of nitrogen
NPRI National Pollutant Release Inventory
NU Nutrient unit
OEB Ontario Energy Board
OFA Ontario Forestry Association
OLA Outdoor Living Area
OMAF Ontario Ministry of Agriculture and Food
OMB Ontario Municipal Board
OPG Ontario Power Generation Incorporated
ORC Ontario Realty Corporation
ORM Oak Ridges Moraine
PET Polyethylene terephthalate (plastic)
PFCs Perfluorocarbons
PPS Provincial Policy Statement
PTTW Permit to take Water
PWQO Provincial Water Quality Objectives
RMC Refrigerant Management Canada
SDCs Soft drink containers
SEV Statement of Environmental Values
SLDF Sierra Legal Defence Fund
SO_2 Sulphur dioxide
STP Sewage Treatment Plant
SWMP Stormwater Management Planning
TP Total Phosphorus
TSSA Technical Standards and Safety Authority
US EPA United States Environmental Protection Agency
VOCs Volatile Organic Compounds
WDO Waste Diversion Ontario
WMPG Water Management Plan Guidelines
WNv West Nile virus

Legislation
CEPA *Canadian Environmental Protection Act*
CFSA *Crown Forest Sustainability Act*
EAA *Environmental Assessment Act*
EBR *Environmental Bill of Rights*
EPA *Environmental Protection Act*
ESA *Endangered Species Act*
FWCA *Fish and Wildlife Conservation Act*
NMA *Nutrient Management Act*
OEBA Ontario Energy Board Act
ORMCA *Oak Ridges Moraine Conservation Act*
OWRA *Ontario Water Resources Act*
POA *Provincial Offences Act*
SDWA *Safe Drinking Water Act*
SWSSA *Sustainable Water and Sewage Systems Act*
WDA *Waste Diversion Act*

PREFACE: INTRODUCTION TO THE SUPPLEMENT

The Supplement to the 2003/2004 annual report consists of eleven sections. The following summary contains highlights of each section and discusses the role of the Environmental Commissioner of Ontario (ECO) in reporting this information to the public.

Section 1 - Unposted Decisions

Under the *Environmental Bill of Rights* (*EBR*), prescribed ministries are required to post notices of environmentally significant proposals on the Environmental Registry for public comment. These are called proposal notices and, according to the *EBR*, are to be followed by a decision notice once a ministry has made a decision on how it will proceed. Monitoring ministry activities helps the ECO to stay on top of important environmental developments, and when necessary, to remind the ministries of their obligation to post environmentally significant proposals on the Registry for public comment.

Section 1 of this Supplement summarizes the ECO's tracking of potential unposted decisions during the past reporting year and presents our findings on ministry responses to our inquiries. While decision-making in all prescribed ministries is reviewed, this year the ECO made inquiries by phone or by letter to officials in five ministries concerning potential unposted decisions.

Section 2 - Ministries' Use of Information Notices

Significant differences exist between the requirements ministries must meet for regular proposal notices posted on the Environmental Registry under sections 15, 16 or 22 of the *EBR* and information notices created under section 6 of the *EBR*. When regular proposal notices are posted on the Registry, a ministry is required to consider public comment and post a decision notice explaining the effect of the comments on the ministry's decision. The ECO reviews the extent to which the minister considered those comments when he or she made the final decision. The ministry is also obligated to consider its Statement of Environmental Values in its decision-making. This process is far superior to the posting of an information notice on the Registry, and provides greater public accountability and transparency.

However, in cases where provincial ministries are not required to post a regular proposal notice, they can still provide a public service by posting an information notice. These notices keep Ontario's residents informed of important environmental developments.

As presented in this section, six ministries posted information notices during the 2003/2004 reporting year. This year the ECO also posted one information notice.

Section 3 - Ministries' Use of Exception Notices

The *Environmental Bill of Rights* relieves the ministries of their obligation to post proposals for public comment in certain situations. There are two main instances in which ministries can post exception notices instead of regular notices. An exception notice informs the public of a decision and explains why it was not posted for public comment.

Ministries are able to post an exception notice under section 29 of the *EBR* when the delay in giving public notice would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property (emergency exception). Ministries can also post an exception notice under section 30 of the *EBR* when the proposal will be or has already been considered in another public participation process that is substantially equivalent to the requirements of the *EBR* (equivalent public participation exception).

During 2003/2004, two ministries posted exception notices. Section 3 summarizes the ECO's review of these notices.

Section 4 - Decision Reviews

Each year the ECO reviews a sampling of the environmentally significant decisions made by the provincial ministries prescribed under the *EBR*. During the 2003/2004 reporting year, more than 2,000 decision notices were posted on the Environmental Registry by Ontario ministries, most of them for site-specific permits or approvals. The extent to which the ECO reviews a ministry decision depends on its environmental significance and the public's interest in the decision.

This section of the annual report consists of detailed reviews undertaken by the ECO for 16 selected ministry decisions posted during 2003/2004.

Sections 5 & 6 - Application Reviews

Under the *EBR*, Ontario residents can ask government ministries to review an existing policy, law, regulation or instrument if they feel the environment is not being protected, and/or they can request ministries to review the need for a new law, regulation or policy (an application for review). The public can also ask ministries to investigate alleged contraventions of environmental laws, regulations and instruments (application for investigation).

The ECO is responsible for reviewing applications for completeness, and for forwarding them to the appropriate ministry. Each reporting year the ECO reviews and reports on the handling and disposition of applications by ministries. Section 5 provides a summary of all the applications for review reviewed by the ECO in 2003/2004; Section 6 provides a summary of all the applications for investigation which were reviewed by the ECO during the same period.

Section 7 - *EBR* Leave to Appeal Applications

Ontario residents have the right under the *EBR* to seek leave to appeal with respect to a decision on certain instruments of environmental significance within 15 days of a ministry's placing a decision on the Environmental Registry. The ECO is responsible for posting notice of a leave to appeal application on the Registry and for updating the notice to report the decision of the appropriate appeal tribunal.

This section provides a summary of the leave to appeal applications under the *EBR* that were received within the 2003/2004 reporting year.

Section 8 - *EBR* Court Actions

Under section 84 of the *EBR*, residents of Ontario have the right to bring a legal action against someone who is violating or is about to violate an environmental Act, regulation or instrument, and is harming, or about to harm, a public resource. In addition, anyone who suffers, or who may suffer, a direct economic loss or personal injury as a result of a public nuisance that caused harm to the environment may bring a legal action under section 103 of the *EBR*. The ECO is responsible for posting notices of court actions on the Registry for information purposes only.

This section provides a summary of court action activities that took place during the 2003/2004 reporting year. There were no whistle-blower complaints under the *EBR* during the reporting year.

Section 9 - Provincial Support for Afforestation and Private Forest Management

This section contains a brief overview of some of the major provincial initiatives related to afforestation and private forest management in southern Ontario between the 1870s and present. This overview provides background to the analysis of southern Ontario forest policy found in pages 29-32 of the ECO 2003/2004 annual report.

Section 10 - Chronology of Changes to Provincial Laws and Policies on Refillable Soft Drink Containers, 1960 - 2003

To provide background to the *EBR* application for review submitted on refillable soft drink containers (see pages 131-134 of this year's annual report), staff at the ECO undertook research on the history of Ontario's legal and policy initiatives on refillable soft drink containers and the Blue Box system. A partial chronology of past government initiatives appears in Section 10.

Section 11 - Undecided Proposals

The ECO is required under section 58(c) of the *EBR* to report annually on all proposals posted on the Environmental Registry within the reporting period (April 1, 2003 to March 31, 2004) that have not had a decision notice posted. This section provides a summary of all such undecided policy, Act, regulation and instrument proposals by ministry.

SECTION 1

ECO REVIEWS OF UNPOSTED DECISIONS IN 2003/2004

SECTION 1: ECO REVIEWS OF UNPOSTED DECISIONS

When it comes to the attention of the Environmental Commissioner of Ontario (ECO) that a ministry subject to the *EBR* has made an environmentally significant decision without first posting a proposal on the Registry, we review that decision to determine whether the public's participation rights have been respected.

The ECO's inquiries of ministries on "unposted decisions" can lead to one of several outcomes. In some cases, the ministry responsible provides the ECO with legitimate reasons for not posting the decision on the Registry. For example, the decision may not be environmentally significant, or it may fall within one of the exceptions allowed by the *EBR*. In other cases, if the ministry has not yet implemented the decision, the ministry subsequently posts a notice on the Registry under sections 15, 16 or 22 of the *EBR* and allows public input. Finally, in certain cases, the decision may remain unposted, with the ECO disagreeing with the ministry's position on the environmental significance of a particular decision and whether it ought to have been posted on the Registry.

Ministry of Energy (ENG) – Policy

Electricity Conservation Strategy

Description

- During the past reporting year, the ECO followed with interest the broad changes occurring within the energy sector. Through this monitoring, the ECO learned that the new government was developing an electricity conservation strategy.
- Because such a strategy would be environmentally significant and would affect a large number of Ontario citizens, the ECO reminded the ministry of its obligation to use the Environmental Registry as one component of its consultation plan.

Ministry Rationale

- In response, the Ministry of Energy stated that the Premier had recently announced elements of a conservation strategy such as: a target of reducing energy demand in Ontario by five per cent by 2007, the installation of smart meters in homes by 2010, and several education and outreach initiatives.
- The ministry noted the government's intent to consult the public in the future on "measures to promote a conservation culture" and to use the Registry to consult on upcoming legislative reform of the province's electricity sector.

ECO Comment

- The ECO believes that the public would welcome, and should have been afforded, the opportunity to participate in the establishment of a province-wide energy reduction target and an overall conservation strategy. In this regard, the Ministry of Energy failed to meet its *EBR* obligation to engage in wide-ranging consultation using the Registry.
- The ECO urges the ministry to post policy proposals on the Registry for any future revisions to the conservation strategy or the target for reducing provincial energy use.

For more information please refer to pages 22-23 of the ECO's 2003/2004 annual report.

Ministry of the Environment (MOE) – Policies

Comprehensive Review of the Differences between the National Pollution Release Inventory (NPRI) and Ontario's Regulation on Airborne Contaminant Discharge Monitoring and Reporting (O.Reg.127/01)

Description

- Through research activities during this reporting year, the ECO became aware of a report entitled: "A Comprehensive Review of the Differences between the NPRI and O.Reg. 127/01." The document was posted on Environment Canada's Web site.
- NPRI is a legislated, nation-wide, publicly accessible inventory. The database contains information on annual contaminant releases to air, water, land and disposal or recycling from all sectors (industrial, government, commercial and others).
- Ontario's O.Reg.127/01 sets out emission reporting requirements to provide MOE with a comprehensive database of air contaminants and greenhouse gases. When developing that regulation, the ministry intended to integrate the program with Environment Canada's NPRI to the extent possible, to allow a one-window approach for reporting.
- The Comprehensive Review, commissioned by the MOE/Environment Canada joint working group established in 2001, identifies specific differences between the two reporting regimes and suggests opportunities to harmonize the requirements of NPRI and O.Reg.127/01.
- The ECO contacted MOE in November 2003, urging the ministry to post an information notice on the Registry about the availability of the Comprehensive Review document.
- The ECO also urged MOE to post a policy proposal on the Registry for any future proposed changes to O.Reg. 127/01 or MOE's air monitoring and reporting program that may flow from the Comprehensive Review.

Ministry Rationale

- In January 2004, MOE staff informed the ECO that an information notice was being prepared. In Spring 2004, ministry staff advised of delays in finalizing the information notice and posting it on the Registry. MOE posted the notice on August 9, 2004 to advise the public of the Review of the NPRI and O.Reg. 127/01.

ECO Comment

- The ECO is pleased that the ministry posted the information notice to apprise the public and stakeholders of development on this project.
- The ECO trusts that the ministry will post future proposed changes to MOE's air monitoring program and/or regulation on the Registry for public input.

Waste Management Procedure for SARS-Related Biomedical Waste

Description

- MOE developed a procedure dated March 31, 2003 outlining containment measures for waste created from treating patients with Severe Acute Respiratory Syndrome (SARS). The procedure required incineration of this waste.
- An updated procedure, issued by the SARS Science Group of the Provincial Operations Centre (POC) and dated April 14, 2003, rescinded the requirements for special containment and incineration. The April procedure noted that SARS-related waste could be handled and disposed of using routine precautions for clinical waste.
- The change was made to reflect new evidence that SARS was spread by droplet or direct contact, not by aerosolization.
- In Fall 2003, the ECO learned of the procedure and asked the ministry why it had not posted an emergency exception notice on the Environmental Registry.

Ministry Rationale

- The Ministry of Health and Long-Term Care led the development of health care-related directives for SARS. However, MOE identified a need to provide guidance on the handling of waste from SARS-related patient treatment.
- On March 28, 2003, MOE contacted the POC about providing direction on this issue. That day, the ministry developed guidance based on the 1994 guideline for biomedical waste management.
- After receiving approval by the SARS Science Group within the POC, MOE formally issued the procedure to the POC on March 31, 2003. Although the procedure was printed on ministry letterhead, the POC distributed the information to health care providers to ensure consistent messaging. MOE distributed the procedure to all biomedical waste management companies. This approach ensured the awareness of all stakeholders.
- On April 14, 2003, the SARS Science Group issued a revised procedure to hospitals. Upon learning of the changes, MOE distributed the revisions to the biomedical waste companies.
- The April 2003 procedures remain in place today within the health care sector.

ECO Comment

- The ECO appreciates the unique situation created by the SARS outbreak and commends MOE for providing guidance on waste management issues.
- If, in the future, MOE provides guidance to the health care sector during an urgent situation, the ECO expects the ministry to post an emergency exception notice. That notice could be updated to reflect any revisions that occur as new information becomes available.

Ministry of the Environment (MOE) – Instruments

Orders for Preventative Measures and Remedial Work – Sound-Sorb Berm

Description

- In March 2004, MOE issued an order for remedial action under section 17 of the *Environmental Protection Act* (*EPA*) and an order for preventative measures under section 18 of the *EPA*.
- The company had used an estimated 70,000 tonnes of paper fibre solids, sand and compost (the mixture known as Sound-Sorb) to construct a berm for sound absorption on the site of a private shooting range near Hamilton.
- The ministry issued the orders because testing in early 2004 showed that effluent from a berm being constructed to absorb sound (Sound-Sorb) at a private shooting range was acutely toxic and exceeded the Provincial Water Quality Standards for E-coli and pH levels, iron, cobalt, molybdenum, aluminum and copper. MOE's on-site inspections showed that berm run-off flows directly into Fletcher Creek which is designated as a Class 1 Cold Water Fishery. Contaminants such as black pigment and paint chips were also on site.
- The Hamilton Conservation Authority also viewed the situation as environmentally significant and laid charges related to the berm because construction was occurring in a regulated fill area without approval.
- The ECO learned that the company had appealed the orders to the Environmental Review Tribunal (an appeal that could not be posted on the *EBR*) and asked the ministry why it had not posted a proposal notice for the orders on the Environmental Registry.
- Several weeks later, on April 16, 2004, the ministry posted an emergency exception notice on the Registry.

Ministry Rationale

- The ministry noted in its exception notice that it did not post a regular notice because it wanted to avoid delays in taking action, especially in light of potentially wet spring conditions that could worsen off-site runoff.

ECO Comment

- The ECO appreciates that MOE needed to act promptly to avoid further environmental impairment. However, given the ministry's ongoing knowledge of environmental problems at the site, and of the public's interest in issues surrounding the use of Sound-Sorb, the ministry could have planned its approach to accommodate the posting of an instrument proposal notice on the Registry for public comment.

- Without a proposal notice posted on the Registry, the public lost its right to seek leave to appeal under section 38 of the *EBR*.

Amendments to Waste Disposal/Transfer Sites Approvals

Private Site in the Town of Innisfil

Description

- In July 2003, the ECO learned that a private company had appealed a condition of an amended Certificate of Approval (C of A) for a waste disposal/transfer site to the Environmental Review Tribunal.
- The condition in question prohibited the disposal on-site of waste that was received and/or generated from off-site. The C of A stated that the amendment had been made to ensure that the Site would be operated in a manner that did not result in a nuisance or a hazard to the health and safety of people or the environment.
- In August 2003, the ECO contacted MOE to determine why this C of A amendment had not been posted on the Registry.
- The appeal to the Environmental Review Tribunal was subsequently withdrawn after a settlement was reached and MOE made a further amendment permitting a specified amount of waste to be disposed of subject to certain limitations.

Ministry Rationale

- In August 2003, MOE responded that it did not consider the changes to be environmentally significant, and that the C of A had been updated as part of an overall review by MOE of waste disposal Cs of A.

ECO Comment

- The ECO finds MOE's explanation to be inadequate. While the C of A may have been updated as part of an overall review, the condition under appeal was clearly environmentally significant, and this fact was recognized in the amended C of A itself.
- The ECO believes that this instrument should have been posted for public comment on the Registry.

Private Site in the City of Sarnia

Description

- In December 2003, the ECO learned that a private company had appealed conditions of an amended C of A for a waste disposal/transfer site to the Environmental Review Tribunal.
- The conditions in question related to: submission of a design and operations plan for the site; a hydrogeological and surface water assessment; and, a finalized financial assurance plan.
- MOE included the conditions to provide for a site design that conforms to current standards of landfill design and operation, and to ensure the provision of funds for any necessary mitigation, closure, long-term care and monitoring of the site.

Ministry Rationale

- MOE responded that the C of A amendments clarified the site's existing approved capacity and then imposed additional conditions requiring the submission of various technical items to the ministry. MOE added that nothing had changed at the site and that the amendment was considered environmentally insignificant.

ECO Comment

- The ECO disagrees with MOE's characterization of the amended conditions as environmentally insignificant.
- The C of A provisions related to a design and operation plan, and hydrogeological and surface water assessment provisions are clearly environmentally significant. These requirements relate to an appraisal of the surrounding environment and potential effects of the landfill; environmental controls and protection measures; monitoring; and, contingency plans to control any potential impacts. The design and operation

plan also requires the permit holder to provide a summary of public consultation undertaken (including comments received and responses to the comments) during the development of the design and operation plan.

- The ministry has posted C of A amendments for this site on the Registry in the past. This amendment should also have been posted to provide for public comment.
- At the preliminary hearing (via teleconference) in May 2004, a settlement was reached. The condition in question was replaced with provisions that used slightly different language, but maintained the actual requirements for environmental studies and assessments, and assessment of financial assurance requirements. At the hearing, MOE noted that the site owner would be required to complete these studies within a reasonable time period and to permit members of the public to review and comment on them.
- As MOE is requiring public input on the environmental studies, a proposal notice should be placed on the Registry.

Protocols for Updating Certificates of Approval (Cs of A)

Description

- In May 2002, MOE posted a policy proposal notice on the Registry (PA02E0007) relating to four protocols designed to guide the ministry in updating permits to take water and numerous Cs of A related to sewage treatment, waste management, air emissions and water works.
- The protocols describe the ministry's existing practices for updating Cs of A, including how MOE will select and assess the Cs of A.
- The ECO had learned through discussion and correspondence with MOE, that the ministry implemented the protocols in 2002 and that the ministry since revised one of the protocols to reflect recent legislative requirements such as the *Safe Drinking Water Act, 2002* (*SWDA, 2002*).
- MOE staff also advised the ECO that since April 2002 the protocols have been applied to more than 1,900 certificates.
- In March 2004, the ECO asked MOE to explain how the application of the protocols affects the posting of notices for C of A amendments on the Registry for public comment. The ECO made this inquiry because several of the certificates issued as a result of applying the protocols were not posted on the Registry but were appealed to the Environmental Review Tribunal.
- The ECO followed up with MOE in early April 2004 with two concerns. First, the ministry had not posted a decision notice for the protocols, despite the protocols' apparent implementation over a two-year period. Second, MOE should consider posting a new proposal notice for the protocols if environmentally significant changes were made since the ministry posted the original proposal notice.

Ministry Rationale

- In its response, MOE explained that the ministry drafted the protocols to: communicate the ministry's objectives and processes for updating specific types of existing approvals; outline the ministry's current priorities for updating the existing approvals it reviews; improve the administration of the approvals process; promote consistency in the approvals process; and, improve public transparency regarding ministry objectives and decision making.
- MOE noted that each of the four protocols describes the approach for determining whether an existing C of A that has been submitted for amendment meets current regulatory, operating and monitoring requirements. The ministry also stated that the protocols ensure that existing approvals will be made more consistent with newly issued Cs of A.
- MOE stated that following the 60-day Registry comment period, stakeholder and public comments were also received in the fall of 2002, with the Protocols being revised "thereafter." Regarding the water protocol, MOE confirmed that *SDWA 2002* regulatory amendments were filed in May/June 2003, with updates made to that protocol "thereafter." Yet, MOE asserts that there is no implementation date for the protocols; that those documents are a formalization of current practice.
- With respect to use of the Registry for Cs of A updated in accordance with the protocols, MOE has stated that the ministry posted any with environmental significance.

ECO Comment

- As the ECO's review of this matter is ongoing; we plan to report in 2004/2005.

For more information please refer to pages 170-171 of the ECO's 2003/2004 annual report.

Ministry of Health and Long-Term Care (MOHLTC) – Policies

Role of Public Health Inspectors in Routine Water Sampling in Rural Areas

Description

- As noted in Section 1 of the Supplement to the ECO's 2002/2003, MOHLTC undertook a review of current policies and procedures to address the role of health units and public health inspectors in the context of routine water sampling under Ontario's Safe Water Mandatory Program. The ECO urged the ministry to post a proposal notice on the Environmental Registry prior to implementing any changes.

Ministry Rationale

- In January 2004, MOHLTC posted policy proposals on the Registry for:
  - A Protocol Respecting Safe Water Program (PG04E0001 - to clarify the roles and responsibilities of MOE and the boards of health respecting notifications and indicators of adverse drinking water quality); and,
  - A Protocol Respecting Drinking Water Sampling (PG04E0004 - to establish standard operating procedures and uniformity for health unit staff working under the direction of the medical officer of health).

ECO Comment

- The ECO commends the ministry for posting these proposals for public comment, as well as several other notices related to the safe drinking water program. The ECO will monitor developments and decisions regarding these issues, and may report on them in a future annual report.

West Nile Virus Preparedness and Prevention Plan for Ontario

Description

- In early May 2003, the government issued the first version of a West Nile Virus Preparedness and Prevention Plan (WNVPP) for Ontario. The government issued a second version on May 27, 2003. The WNVPP provided for the use of certain approved pesticides ("larvicides" and "adulticides") under specific circumstances to control mosquitoes that carry the West Nile virus.
- The updated version of the WNVPP addressed mosquito control measures under O.Reg. 199/03 of the *Health Protection and Promotion Act* and discussed implementation of the regulation that requires Medical Officers of Health to conduct risk assessments.
- The risk assessments identify where the required mosquito control activities (i.e., killing mosquito larvae by "larviciding" or adult mosquitoes by "adulticiding") can be applied most effectively. West Nile virus control measures must take into account: available data; populations at risk; the burden or impact of West Nile virus mortality and morbidity in the human population; non-human surveillance findings; mosquito density distribution and infection rates (if available); seasonal factors; and, local weather and geographic areas.
- Despite its environmental implications, MOHLTC did not post a draft Plan on the Environmental Registry for public comment. At the end of May 2003, the ECO contacted the ministry to inquire about the ministry's plans to post a notice about the WNVPP on the Registry to obtain public input.

Ministry Rationale

- In March 2004, MOHLTC confirmed its position that the *EBR* does not require the Plan to be posted on the Registry as a policy proposal for public comment.
- The ministry stated that the *EBR* only requires environmentally significant initiatives to be posted on the Registry. MOHLTC stated that while the 2003 WNVPP provides for the use of registered (approved) pesticides to control mosquitoes, the ministry also consistently emphasizes the use of personal protective measures and non-pesticide means of preventing and controlling the virus.
- The ministry noted that in 2003 the most widely used larvicide (methoprene) was not detected in Ontario drinking water. Two surface water samples did contain methoprene but the ministry states that the levels were "well below concern."
- The ministry stated that adulticiding (typically by spraying or "fogging") has not occurred to date despite over 400 human cases of the disease in 2002 (with 18 deaths) and 89 confirmed human cases in 2003. The ministry does not believe that adulticide will be used (this typically involves spraying or "fogging") unless there is an extreme local human health emergency.
- According to MOHLTC, it undertook consultation in February 2003 with a broad range of stakeholders about that year's WNVPP. The ministry reported that stakeholder reaction to the process and planning was favourable, but that stakeholders urged the ministry to take great caution with the application of chemicals to control mosquitoes.
- The ministry indicated that it undertook a similar stakeholder process in February 2004 for the 2004 WNVPP.
- MOHLTC offered to post an information notice on the Environmental Registry that would link to the 2003 and 2004 versions of the WNVPP.

ECO Comment

- The ECO does not accept MOHLTC's rationale for not using the Registry.
- The ministry told the ECO that it consulted with stakeholders when forming the 2003 and 2004 WNVPPs (several months in advance of releasing the documents) and that MOHLTC placed the 2003 Plan on the ministry's Web site. Merely posting information on a Web site after the fact is not comparable to soliciting and considering public input through a policy proposal notice on the Registry. Moreover, the subsequent decision notice would have shown the public how their comments were taken into account. And, according to the ECO's 1996 Guidance Document on implementing the *EBR*, ministries should make policy proposals public on the Environmental Registry at the same time other public consultation begins.
- Because the 2003 and 2004 WNVPPs are environmentally significant and meet the *EBR*'s definition of policy, the ministry had an obligation to consult with the public when developing its approach for addressing the West Nile virus.
- The ECO is pleased that after further correspondence the ministry committed to using the Registry to consult with Ontarians on elements of the 2005 West Nile virus Plan. MOHLTC also posted an information notice on the Registry (XG04E0001) to make the 2003 and 2004 Plans widely available to the public through the Registry.

For more information please refer to pages 21-22 of the ECO's 2003/2004 annual report.

Ministry of Natural Resources (MNR) – Policies

Forest Management Plan (FMP) Note for Old Growth

Description

- During this reporting year, the ECO reviewed MNR's decision on its Conservation Strategy for Old Growth Forest Ecosystems on Crown Lands in Ontario (PB7E6009). As part of that appraisal, the ECO also assessed MNR's FMP Note for Old Growth.
- MNR's Old Growth Policy states that the ministry "will develop consistent requirements for old growth conservation in forest management planning to ensure minimum standards and effectiveness in old growth conservation objectives and strategies over the long-term. These requirements will be communicated through a Forest Management Planning Note."

- The FMP Note describes what the old growth objectives or strategies should address. The Note also says that silvicultural ground rules in uneven-aged forest units in the Great Lakes-St. Lawrence Forest Region will reflect management techniques for providing structural attributes associated with old growth in managed stands. Neither detail is contained in MNR's Old Growth Policy or in its Forest Management Planning Manual (FMPM).

Ministry Rationale

- MNR's position is that the Old Growth FMP Note does not provide policy direction. It describes how direction in the old growth policy fits with several steps in the forest management planning process described in the FMPM. It also provides forest management planning teams with technical advice and information that they may with to consider or use when developing approaches for conserving old growth when preparing a forest management plan. If the team requires policy advice, they are to consult with MNR regional specialists.

ECO Comment

- Because the FMP Note contains new policy as defined in section 1(1) of the *EBR*, the ECO believes that MNR should have posted the Note on the Registry as a proposal for public comment.
- The ECO is also concerned that the Old Growth Policy direction and the further development of consistent requirements promised in the Policy are being implemented through an "FMP Note." The FMP Note has an uncertain legal status in terms of *EBR* applications for investigation and private prosecutions, and which MNR intends to revise from time to time.

For more information please refer to pages 99-104 of the ECO's 2003/2004 annual report and pages 155-166 of this Supplement.

Independent Forest Audit Process and Protocol (IFAPP)

Description

- Independent Forest Audits are required to assess: compliance of a managed forest with the *Crown Forest Sustainability Act* (*CFSA*); compliance with the forest management planning process; planned versus actual forest management activities; effectiveness of forest management activities in achieving audit criteria and management objectives; and, licensees' compliance with Sustainable Forest Licences.
- The IFAPP establishes the course of action for conducting those Audits, including: the roles and responsibilities of the audit team and auditees; components of the audit; the development of action plans and status reports; record retention; and, information to be gathered from auditees.
- In December 2001, MNR posted a proposal on the Registry for planned changes to the Independent Forest Audit Program (PB01E7003). Attached to this notice was the draft 2001 version of the IFAPP. The ministry never posted a decision on the 2001 proposal, but issued a revised IFAPP in 2001, 2002 and 2003. The 2002 and 2003 versions of the IFAPP document indicated that significant changes to the program were implemented each year and further changes were anticipated for the future.
- Based on information in the 2003 IFAPP, the ECO understood that MNR proceeded from 2002 onward with implementation of the Process and Protocol. However, it was not clear which version of the IFAPP reflected an MNR decision on the proposal. And, it appeared that changes to the Protocol were anticipated for the future.
- In March 2004, the ministry posted a proposal on the Registry for a regulation under the *CFSA* to generally govern the conduct of independent forest audits (RB04E7001). That notice suggests the IFAPP may be revised again.
- In March 2004, the ECO contacted MNR to urge the ministry: to: post a decision notice for its 2001 proposal on the Independent Audit Program and the associated IFAPP; to post a new proposal notice on the Registry if environmentally significant changes to the IFAPP had been made since the 2001 version; and to post proposal notices on the Registry for any future environmentally significant IFAPP changes that are proposed.

Ministry Rationale

- In response, MNR stated that the 2001 review of Independent Forest Audit Program (not the IFAPP) was posted as a policy proposal on the Registry for public input. According to the ministry, MNR attached the most current IFAPP to that Registry notice as a courtesy and to assist those who may be providing comments on the overall Audit Program.
- MNR maintained that IFAPP documents set out detailed administrative requirements for the conduct of the audits and therefore fall outside the *EBR* definition of policy. The ministry noted that even if the IFAPP met the definition of policy, the Process and Protocol is not environmentally significant.
- Regarding the lack of decision notice for the 2001 review of the Audit Program, MNR apologized for the oversight and agreed to correct the problem.
- MNR clarified that the March 2004 regulation governing the conduct of forest audits contains principles and objectives and would not significantly change the IFAPP.

ECO Comment

- Since 1997, the ECO has maintained (in the Supplement to that year's annual report) that the IFAPP constitutes an environmentally significant policy that warrants public consultation through the Registry.
- The process followed by forest audit teams leads directly to decisions about whether or not to renew Sustainable Forest Licences. These licences give the forest industry permission to harvest and replant forests on public land. And MNR relies quite heavily on Independent Forest Audits as a safeguard in its forest compliance program.
- The 2003 version of the IFAPP provides further evidence of environmental significance and the importance of allowing for public input into changes to the Process and Protocol: "A series of notable changes have been made to the audit program for 2003…The importance of addressing sustainability is also being emphasized."
- Legal conditions written into the province's broad environmental assessment rules for forest management require that the IFAPP be reviewed "at least every five years" with an opportunity for public review. MNR has informed the ECO that this review will be initiated by June 2008. Based on the ECO's analysis public review of the IFAPP is warranted earlier than five years and the Registry should be used as part of the public input process.
- The ECO urges MNR to adhere to *EBR* requirements by posting on the Registry for comment any future environmentally significant IFAPP changes that are proposed. Such a practice would be consistent with the commitment that MNR made to the ECO in 1997, to post the IFAPP on the Registry for comment.

Recovery Planning Guidelines for Species at Risk in Ontario; Guidelines for Listing and Regulating Species at Risk in Ontario; Landowner Contact Tool Kit for Species at Risk Listing and Regulation

Description

- MNR produced the above-noted draft documents, dated June 2003, and released them internally without posting a notice on the Environmental Registry. Each document welcomes comments from ministry staff.
- The direction contained in the reports appeared to be designed to fill a gap caused by the absence of a cohesive and publicly available provincial Species at Risk Strategy, or to support such a Strategy once it is developed. The ECO also believes that these policies are environmentally significant and should not be viewed solely as internal ministry directives.
- For that reason and because the policies merit public input, the ECO contacted MNR and urged the ministry to post policy proposal notices for the documents on the Registry if final decisions had not been made.

Ministry Rationale

- MNR informed the ECO that the documents are not designed to fill a gap or provide policy support and that they do not meet the *EBR*'s definition of policy, but instead are internal procedural administrative documents to guide staff's development of specific recovery strategies as well as proposals for listing and regulating species at risk.
- The ministry also noted that it posts draft recovery strategies, and is listing and regulating proposals on the Registry for public comment.

ECO Comment

- While MNR's documents contain administrative elements, they guide staff's development of important environmental strategies, lists and regulations. As such, the ECO views them as policies.
- The fact that specific recovery strategies and proposals for listing and regulation should also be posted on the Registry does not remove the need to consult publicly on the guiding principles, especially in the interim as we await the provincial Species at Risk Strategy.
- Regarding MNR's statement about use of the Registry, only two species at risk recovery plans or strategies have been posted, despite ministry records showing that more than 20 exist in draft form.
- The ECO encourages MNR to reconsider its position and use the Registry to solicit public input on its species at risk guidance documents.

For more information please refer to pages 23-24 of the ECO's 2003/2004 annual report.

Statements of Conservation Interest for Conservation Reserves

Description

- As of May 2004, Ontario had 234 conservation reserves regulated under the *Public Lands Act*, covering approximately 15,000 km^2. The vast majority of these sites were created as a result of Ontario's Living Legacy (OLL) and an additional 68 areas are yet to be regulated. MNR views conservation reserves as offering protection for natural heritage areas on public lands, while permitting many traditional public land uses such as hunting to continue.
- MNR requires that one of two types of management plans be developed for a conservation reserve, either a "statement of conservation interest" or a "resource management plan." The intent and purpose of these types of plans are no different than for provincial parks and no less important. A statement of conservation interest is the minimum level of policy direction for a conservation reserve, identifying the purpose and outlining the management intent for the area. For a conservation reserve with complex issues, the ministry develops a comprehensive resource management plan that may detail additional actions, information, and options.
- Ministry policy recognizes that statements of conservation interest "may require some level of public consultation" and that compliance requirements of the *EBR* "will be met." However, not one of the 155 completed statements of conservation interest has been posted on the Environmental Registry for public review and comment. MNR field managers have selectively consulted individuals or organizations in developing a significant number of these plans.

Ministry Rationale

- In a 1998 internal memo, MNR stated that if the preparation of a statement of conservation interest merits public consultation then it will be posted on the Environmental Registry.
- In 2004, MNR informed the ECO that it believes that public consultation is not required if there was previous consultation on the area's protection.

ECO Comment

- The ECO disagrees with MNR's position that allows ministry staff to decide on a case-by-case basis whether public consultation is necessary. All statements of conservation interest are environmentally significant policies that should be posted on the Environmental Registry for a minimum 30-day comment period. The *EBR* requires that all policies – and MNR itself recognizes statements of conservation interest as policies – shall be posted on the Environmental Registry if the minister considers that the public should have an opportunity to comment.
- MNR's position implies that site-specific planning options, such as where to locate a snowmobile trail or how to protect a particular species in a conservation reserve, were a component of public consultations in the Lands for Life/OLL process. However, this was not case. While the OLL Land Use Policy (posted on the Registry for comment) established new areas for protection, it did not address the individual planning issues of each area. Further, MNR posted exception notices on the Environmental Registry to regulate these sites, without *EBR* opportunities for public comment.

For more information please refer to pages 44-45 of the ECO's 2003/2004 annual report.

Ministry of Transportation (MTO) – Policy

Transportation Planning within the Oak Ridges Moraine (ORM) Conservation Plan

Description

- The Ministry of Municipal Affairs and Housing (leading the government's ORM Conservation Plan initiatives), informed the ECO that MTO is developing guidance material on ORM Conservation Plan policies as they relate to transportation infrastructure.
- The ECO contacted MMAH and MTO to gather more information about the ministries' plans for posting this environmentally significant policy on the Environmental Registry for public comment.

Ministry Rationale

- MTO responded, confirmed the ministry's intention to prepare guidance materials for the ORM Conservation Plan as part of is larger Environmental Standards Project (ESP), specifically through a document describing Environmental Protection Requirements (EPR).
- MTO posted the draft EPR document as a policy proposal on the Registry for public comment in April 2004 (PE04E4551). The draft report clarifies MTO's environmental obligations under federal and provincial law and policy, and interprets how each obligation applies to transportation planning, and highway design, construction, operation and maintenance. EPR apply province-wide.
- The ministry intends to address transportation planning within the ORM Conservation Plan as part of the EPR document. However, since that component is still under development, MTO plans to post a separate policy notice on the Registry in Summer or Fall 2004.
- Once finalized, the ministry plans to integrate the ORM component into the broader EPR document.
- MTO also explained that it plans to develop standards for regional and local roads within the ORM Conservation Plan area towards the end of 2005, upon the ministry's completion of the ESP.

ECO Comment

- The ECO is pleased that MTO plans to post a policy proposal notice on the Registry for the ORM Conservation Plan component of the EPR.
- In that notice, MTO should clarify its process (including timeframe) for integrating the ORM Conservation Plan component into the broader EPR document.

SECTION 2

ECO REVIEWS OF MINISTRIES' USE OF INFORMATION NOTICES IN 2003/2004

SECTION 2: ECO REVIEWS OF INFORMATION NOTICES

Use of Information Notices

In cases where provincial ministries are not required to post a proposal notice on the Environmental Registry for public comment, they may still provide a public service by posting an "information notice" under section 6 of the *EBR*. These notices keep Ontarians informed of important environmental developments.

Ministries should use an information notice only when they are not required to post a regular notice for public comment (under sections 15, 16 or 22 of the *EBR*). Significant differences exist between regular proposal notices posted on the Registry and information notices. With regular proposal notices, a ministry is required to consider public comments and post a decision notice explaining the effect of comments on the ministry's decision. The ECO then reviews the extent to which the minister considered those comments when he or she made the final decision. The ministry must also consider its Statement of Environmental Values in the decision-making process. This approach is superior to posting an information notice and provides greater public accountability and transparency.

As described in more detail in the ECO's 2000/2001 annual report, if a prescribed ministry decides that it is appropriate to seek public comment on a policy, Act or regulation proposal through the Registry, the correct procedure is to post a regular notice, not an information notice. Soliciting comments through information notices causes confusion for the public, since, as noted above, there is no legal requirement for the ministries to consider public comments or to post a final decision with regard to information notices. Ministries that post information notices can certainly inform the public in the text of the notice about the availability of any other "non-*EBR*" consultation opportunities.

Quality of Information Notices

Ministries should strive to ensure that notices use plain language and precise explanations, and provide an adequate level of detail. The ECO encourages ministries to update information notices if new developments occur in relation to an ongoing project, and to clearly indicate which information is new in updated notices. Ministries should ensure that all notices include the name, address, phone number and fax number of a ministry contact person, and provide adequate information about any non-*EBR* consultations underway.

Ministry of Municipal Affairs and Housing (MMAH) – Regulations

Minister's Zoning Orders

EBR Registry #s:

XF03E0003	-O.Reg. 154/03 made under the *Planning Act* – City of Pickering
XF03E0004	-O.Reg. 183/03 amending O.Reg. 102/72 made under the *Planning Act* – City of Pickering
XF03E0005	-O.Reg. 182/03 amending O.Reg. 104/72 made under the *Planning Act* – Regional Municipality of York
XF03E2001	-O.Reg. 206/03 amending O.Reg. 834/81 made under the *Planning Act* – District of Sudbury
XF03E0006	-O.Reg. 198/03 made under the *Planning Act* – Town of Oakville
XF03E2002	-O.Reg. 289/03 amending O.Reg. 834/81 made under the *Planning Act* – District of Sudbury

XF03E0007	-O.Reg. 339/03 amending O.Reg. 104/72 made under the *Planning Act* – Regional Municipality of York
XF03E0008	-O.Reg. 359/03 made under the *Planning Act*
XF03E0009	-O.Reg. 389/03 amending O.Reg. 482/73 made under the *Ontario Planning and Development Act* – City of Burlington
XF03E0012	-O.Reg. 393/03 made under the *Planning Act* – Town of Richmond Hill
XF03E0013	-O.Reg. 396/03 amending O.Reg. 154/03 made under the *Planning Act* – City of Pickering
XF04E0003	-O.Reg. 431/03 made under the *Planning Act*
XF04E0002	-O.Reg. 432/03 and O.Reg. 435/03 made under the *Planning Act* – numerous municipalities throughout the Golden Horseshoe
XF04E4005	-O.Reg. 449/03 amending O.Reg. 377/86 made under the *Planning Act* – District of Kenora
XF04E0005	-O.Reg. 45/04 amending O.Reg. 481/73 made under the *Ontario Planning and Development Act*
XF04E0006	-O.Reg. 52/04 amending O.Reg. 473/73 made under the *Ontario Planning and Development Act*

Description

- Minister's zoning orders are regulations that allow the minister to control land use in areas without municipal organization or in areas where the provincial government has an interest.

ECO Comment

- Acceptable use of information notices. Minister's Zoning Orders are not prescribed under the *EBR*.
- MMAH should have indicated the municipality in which the regulations apply in XF03E0008, XF04E0003, XF04E0005 and XF04E0006. Links to the regulations should have been provided in all notices.

Ministry of Municipal Affairs (MMAH) – Instruments

The Oak Ridges Moraine Conservation Plan Conformity Amendments

EBR Registry #s:

XF03E0010	-Region of York Regional Official Plan Amendment 41
XF03E0011	-Amendment Number 7 to the Official Plan of the Regional Municipality of Peel
XF03E9001	-Former Township of Alnwick (now Alnwick/Haldimand) Official Plan Amendment 10
XF03E9002	-Former Township of Haldimand (now Alnwick/Haldimand) Official Plan Amendment 5
XF03E0015	-Amendment Number 89 to the Official Plan of the Regional Municipality of Durham
XF03E9004	-Township of Cavan-Millbrook-North Monaghan Official Plan Amendment No. 2
XF03E9003	-Township of Cramahe Official Plan Amendment 4
XF03E9005	-County of Peterborough Official Plan Amendment No. 1
XF04E0001	-Town of East Gwillimbury Official Plan Amendments No. 116 and 117
XF04E9001	-Municipality of Port Hope Official Plan Amendment 8 to the Ward 2 Official Plan
XF04E0004	-Town of Aurora Official Plan Amendment No. 48
XF04E0007	-Town of Markham Official Plan Amendment No. 117
XF04E0008	-City of Vaughan Official Plan Amendment No. 604

Description

- MMAH posted these notices to inform that public that it was considering Official Plan amendments proposed by municipalities to bring their Official Plans into conformity with the Oak Ridges Moraine Conservation Plan. The notices indicated that MMAH would accept comments from the public on the amendments, for up one month after the date of posting in most cases.
- In each notice MMAH indicated that it is proposing to prescribe the *Oak Ridges Moraine Conservation Act, 2001 (ORMCA)* and classify instruments of the Act under the *EBR* at a later date.

ECO Comment

- Acceptable use of information notices. The ECO has urged MMAH to prescribe the *ORMCA* and classify instruments under the Act under the *EBR* as soon as possible. On September 2, 2003, MMAH posted a notice (RF03E0002) on the Registry to inform the public about a proposed regulation to prescribe the *ORMCA* under the *EBR*. The proposal would make the *ORMCA* subject to several provisions of the *EBR*.

including Part II proposals for regulations and classifying proposals for instruments. On the same day, MMAH posted a second notice (RF03E0003) on the Registry to inform the public that it is proposing to classify instruments under the *ORMCA* as Class I instruments.

- For further information on the *ORMCA* and Plan, please refer to pages 72-79 of the ECO's 2001/2002 annual report and pages 123-133 of the ECO's 2001/2002 Supplement.

Ministry of Natural Resources (MNR) – Policies

Nuisance Bear Review Committee Report and Recommendations

***EBR Registry* #:** XB03E6007

Description

- MNR posted this notice in November 2003 to inform the public that the Nuisance Bear Review Committee had completed its review of scientific information related to the nuisance bear issue in Ontario and issued a report with recommendations. The committee was charged with reviewing the biology, literature, and geographic and socio-economic factors related to perceived nuisance bear problems in Ontario. It was also directed to look at municipal impacts and compare the effects of bear harvesting from jurisdiction to jurisdiction.
- The report discusses the committee's finding that there is no relationship between the cancellation of the spring bear hunt and levels of nuisance activity. It also issues recommendations for dealing with the nuisance activity and the economic impact of the cancellation of the spring bear hunt.
- The notice indicated that the public comments submitted through Registry notice XB03E4001 were considered by the committee.

ECO Comment

- Acceptable use of an information notice.
- Please refer to page 12 of the ECO's 2002/2003 Supplement for further information on XB03E4001.

Forest Roads and Water Crossings Initiative – Task Team Report

***EBR Registry* #:** XB03E7001

Description

- MNR posted this notice in December 2003 to inform the public of the release of the Forest Roads and Water Crossings Initiative – Task Team Report. The report is one of two components of the Forest Roads and Water Crossings Initiative which was initiated in November 2000.
- The report examines how responsibility for monitoring and maintenance of existing forest roads is currently partitioned between MNR, the forest industry and other users. It provides a recommended approach to clarify the assignment of responsibility for all existing infrastructure and a proposed mechanism to transfer responsibility as the use of individual roads changes over time. The report identifies the need to initiate a planning and consultation process to update or develop use-management strategies for all existing forest access roads including those not currently addressed in approved forest management plans.
- The notice indicated that the report would be considered in the event of future policy development pertaining to forest access roads on Crown land and that any policies that are developed as a result of the report will be posted on the *EBR* Registry for further public review and comment before they are adopted.

ECO Comment

- Acceptable use of an information notice.
- For further discussion of forest access roads, please refer to page 98 of this year's annual report and pages 200-205 and 240-246 of the Supplement.

Identification of the Wild Turkey Capture and Release Locations in Ontario for the Winter 2004 (January through April) Trap and Transfer Program Delivery Period
EBR Registry #: XB03E6004

Description

- MNR posted this notice in December 2003 to inform the public of proposed activities involving the relocation of eastern wild turkeys within Ontario from January to April, 2004. The notice indicated that, while MNR has successfully restored turkey populations to many parts of southern Ontario through a restoration program initiated in 1984, there are some areas within the program area where sustainable turkey populations have not yet been reestablished.
- The notice specified the districts (and in some cases, the townships) in which it expects the four trapping and three release sites will be located. It explained that the proposed trapping locations currently support wild turkey densities that will accommodate removal of a small number of wild birds without negatively affecting the sustainability of local populations. Environmental screening of the proposed release sites did not identify any significant concerns with respect to the natural environment; land use or resource management; social, cultural and economic; aboriginal; or other considerations.
- The notice indicated that consultation was conducted at the local level where deemed necessary and appropriate.

ECO Comment

- Acceptable use of an information notice.

Ministry of Natural Resources (MNR) – Regulations

Lake Trout Population in Red Lake in Jeopardy due to Recruitment Failure – Management Options to be Considered
EBR Registry #: XB03E1003

Description

- MNR posted this notice on June 3, 2003 to consult on three proposed management options to address the problem of recruitment failure in Red Lake lake trout. The management options to be considered were: closure; catch and release; and no change. MNR indicated that closure was its preferred option.
- On January 15, 2004, MNR updated the notice to inform the public of its decision to issue a variation order under the Ontario Fishery Regulations to adopt the catch and release option, based on the comments received through the Registry and on the recommendation of a stakeholder focus group.

ECO Comment

- Acceptable use of an information notice.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposals on the Registry.

Proposal to Ban the Importation of Leeches into Ontario, January 1, 2004 under the Ontario Fishery Regulations (OFR)
EBR Registry #: RB02E6002

Description

- MNR posted this notice in July 2003 to inform the public of its decision to implement a complete ban on the importation of leeches into Ontario on January 1, 2005. The ban is intended to prevent the introduction of exotic species into Ontario waters.
- This notice updates a notice posted by MNR in August 2002. The August 2002 posting proposed implementing a complete ban on January 1, 2004 and solicited public comments on the proposal.

- A ban on the importation of leeches for non-commercial purposes was put in place in 1999. Licensed dealers and harvesters were allowed to continue importing leeches under a set of protocols developed by MNR and the industry until a complete ban was in place.

ECO Comment

- Acceptable use of an information notice.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposals on the Registry.

Yellow Perch Regulation Change in the Eastern Basin of Lake Erie
EBR Registry#: XB03E6003

Description

- MNR posted this notice in November 2003 to inform the angling community of the eastern basin of Lake Erie of a regulation change which increases the daily catch and possession of yellow perch in the eastern basin of Lake Erie. Under its 2000 East Basin Rehabilitation Plan, the ministry had implemented a reduced quota for the commercial yellow perch industry and a daily catch and possession limit of 25 yellow perch for the angling fishery. Since the implementation of the limits, the yellow perch population of Lake Erie has rebounded significantly. The notice indicated that the regulation will increase the daily catch and possession limit of yellow perch in the eastern basin of the lake to 50 for the sport licence and 25 for the conservation licence.

ECO Comment

- Acceptable use of an information notice.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposals on the Registry.
- MNR should have indicated the effective date of the regulation in the notice.

Walleye Regulation Change in the Central and Western Basins of Lake Erie
EBR Registry #: XB03E6002

Description

- MNR posted this notice in November 2003 to inform the public that it had issued a variation order under Subsection 14(1) of the Ontario Fishery Regulations (OFR) to: (1) reduce the catch and possession limit for walleye in the central and western basin for sport and conservation licences; and (2) implement a closed season for walleye angling in the central and western basins of Lake Erie. The closed season was to run from March 15 to the second Friday in May, beginning in 2004. It was designed to protect spawning walleye and promote successful reproduction of the fish population which has been in decline since 1988.
- MNR updated the notice in early December 2003. The second version of the notice was identical to the original notice except that point (1) of the original notice (described above) had been removed. MNR subsequently updated the notice in January 2004 to amend the end date of the closed season. It indicated that the closed season was to run from March 15 to the Friday before the second Saturday in May (changed from the second Friday in May), beginning in 2004.

ECO Comment

- Acceptable use of an information notice.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposals on the Registry.
- In issuing updates to the notice MNR should have explained how and why the notice had been modified from the earlier version.

Brook Trout Regulation Change in Lake Superior, Lake Nipigon, and Tributary Streams – Management Options to be Considered
EBR Registry #: XB04E1010

Description

- MNR posted this notice in March 2004 to inform the public of options proposed by the ministry and the Lake Superior Brook Trout Committee to protect and enhance coaster brook trout populations in Lake Superior, Lake Nipigon and in their tributary streams and to consult on the proposed options. The notice indicated that brook trout numbers are currently greatly reduced in those waters to the point where only a few viable populations persist.
- The ministry and the committee proposed changing the angling season to run from the last Saturday in April to Labour Day. It also asked the public to choose between two proposed regulatory options to change the catch, possession and size limits: (1) catch and possession of one brook trout, with a minimum size of 22"; or (2) catch and possession of one brook trout, either less than 10" or greater than 22".

ECO Comment

- Acceptable use of an information notice.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposals on the Registry.
- The notice should have indicated the dates of the current angling season and what the current catch, possession and size limits are.

Ministry of Natural Resources (MNR) – Instruments

Water Management Plans (WMP)
EBR Registry #'s:

XB03E2013	-WMP for the South River – Invitation to Participate
XB03E3002	-WMP for the Muskoka River – Review of Background Information Report
XB03E2016	-WMP for the Spanish-Vermilion River System – Invitation to Participate
XB02E1011	-WMP for the Eagle and Wabigoon Rivers – Review of Options
XB03E3004	-WMP for the Bonnechere River – Draft Plan Review
XB03E3005	-WMP for the Mississippi River – Invitation to Participate
XB02E1010	-WMP for the Seine River System – Invitation to Participate
XB03E2006	-WMP for the Blind River – Review of Options
XB02E2009	-WMP for the Wanapitei River – Open Houses for the Background Scoping Document
XB02E1007	-WMP for the Nipigon River – Review of Options
XB02E1008	-WMP for the Aguasabon River – Review of Options
XB03E3002	-WMP for the Muskoka River – Review of Background Information Report
XB03E2006	-WMP for the Blind River – Draft Plan Review
XB03E3003	-WMP for the South River – Review of Operating Strategy
XB03E2007	-WMP for the Mattagami River System – Open Houses for Background Scoping and the Preliminary Preferred Options
XB03E2008	-WMP for the Abitibi River System – Open Houses for Review of Scoping Report and preliminary preferred options
XB03E2017	-WMP for the White River System – Invitation to Participate
XB02E2010	-WMP for the Matabitchuan River – Review of Options: First Information Centre
XB02E2011	-WMP for the Montreal River – Review of Options: First Information Centre
XB02E1011	-WMP for Eagle and Wabigoon Rivers – Draft Plan Review
XB02E2010	-WMP for the Matabitchuan River – Review of Draft Plan
XB02E2011	-WMP for the Montreal River – Review of Draft Plan
XB03E3002	-WMP for the Muskoka River – Review of Options Report
XB02E1010	-WMP for the Seine River System – Notice of Draft Plan

Description

- WMPs are instruments issued by MNR. Under the *Lakes and Rivers Improvement Act*, MNR has the authority to order dam owners to prepare management plans in accordance with the Water Management Planning Guidelines for Waterpower.

ECO Comment

- Acceptable use of information notices.
- WMPs are not yet classified as instruments under the *EBR*. The ECO has urged MNR to classify the plans as soon as possible. For further information, please refer to page 11 of the ECO's 2002/2003 annual report.
- In Registry notice # XB03E3002, MNR indicated, upfront in the notice, that its Options Report would be available for viewing in the local libraries throughout the area. The ECO encourages the ministry to make these reports widely available in other regions and to announce their availability upfront in Registry notices.
- For further discussion of the Water Management Planning Guidelines for Waterpower, please refer to pages 108-112 of the 2002/2003 annual report and pages 161-168 of the 2002/2003 Supplement.

Regional Municipality of Halton - Approval of Sale, Lease or other means of Disposition of Land by a Conservation Authority – *CCA* s. 21 (2)
EBR Registry #: XB03E3003

Description

- MNR posted a notice in July 2003 to inform the public that it was considering approval of a proposed land disposition under section 21(2) of the *Conservation Authorities Act* (*CAA*) by the Halton Region Conservation Authority (HRCA). The notice invited members of the public to submit written comments over the following one-month period. The notice was republished in August 2003 to extend the comment period.
- The 0.082 hectares proposed for sale would be sold to a private developer. The HRCA proposed to retain the net disposition proceeds in reserve for use on HRCA priority capital projects.
- In October 2003, MNR updated the notice to indicate that the minister had approved the Land Disposition Order that month and that no comments were received as a result of the posting.

ECO Comment

- Unacceptable use of an information notice. It is the ECO's opinion that proposals for the disposition of land sales under the *CAA* are prescribed instruments under the *EBR*. Please refer to page 10 of the ECO's 2002/2003 annual report.
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15 of this Supplement.

Lake Nipigon Forest & Armstrong Forest Amalgamation Proposal
EBR Registry #: XB03E1013

Description

- MNR posted this notice in August 2003 to inform the public that it had received a proposal from Norampac Inc. to amalgamate the Lake Nipigon Forest and Armstrong Forest. Norampac Inc., the current owner of Sustainable Forest Licences for both forests, proposed to create a single, larger management unit under the name of the Lake Nipigon Forest. The notice indicated that the company submitted a detailed proposal that provides an overview of its rationale for amalgamation and answers a list of key questions/considerations as per MNR's requirements for proposals to amalgamate management units. MNR invited the public to participate in the consultation process by submitting comments on the proposal and indicated the locations and times when the proposal would be available for viewing.

ECO Comment

- Acceptable use of an information notice. Proposals to designate all or part of Crown forests as a management unit under section 7 of the *Crown Forest Sustainability Act* are not prescribed instruments under the *EBR*.

City of Kingston - Approval of Sale, Lease or other means of Disposition of Land by a Conservation Authority – *CCA* s. 21 (2)
***EBR Registry* #:** IB02E6001

Description

- MNR posted this notice in October 2003 to inform the public of its decision to approve a land disposition by the Cataraqui Region Conservation Authority under section 21(2) of the *Conservation Authorities Act* (*CAA*). The notice was an update to a notice posted in May 2002 in which MNR outlined its proposal to permit the conservation authority to sell 1.85 hectares in Kingston to a private developer in exchange for a property of equal size plus additional financial proceeds.
- The update indicated that the minister had approved the land disposition in late June 2002. The development proposal was the subject of an Ontario Municipal Board Hearing in June 2003, at which time the proposal received approval.

ECO Comment

- Unacceptable use of an information notice. It is the ECO's opinion that proposals for the disposition of land sales under the *CAA* are prescribed instruments under the *EBR*. Please refer to page 10 of the ECO's 2002/2003 annual report.
- Please refer to page 13 of the ECO's 2002/2003 Supplement for the review of the May 2002 proposal notice.
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15 of this Supplement.

City of Oshawa - Approval of Sale, Lease or other means of Disposition of Land by a Conservation Authority – *CCA* s. 21 (2)
***EBR Registry* #:** XB03E3006

Description

- MNR posted this notice in November 2003 to inform the public that it is considering approval of a proposed land disposition under section 21(2) of the *Conservation Authorities Act* (*CAA*) by the Central Lake Ontario Conservation Authority (CLOCA) and to solicit public input over the following one-month period. The notice indicated that the 41 hectares of CLOCA property, known as the Cedar Valley Conservation Area, proposed for sale would be sold to the City of Ottawa for continued passive recreation purposes. The CLOCA proposed to retain the net disposition proceeds in reserve for use on CLOCA priority capital projects, including the future acquisition of high priority, sensitive Oak Ridges Moraine lands.

ECO Comment

- Unacceptable use of an information notice. It is the ECO's opinion that proposals for the disposition of land sales under the *CAA* are prescribed instruments under the *EBR*. Please refer to page 10 of the ECO's 2002/2003 annual report.
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15 of this Supplement.

City of Oshawa -Approval of Sale, Lease or other means of Disposition of Land by a Conservation Authority – *CCA* s. 21 (2)
EBR Registry #: XB03E3007

Description

- MNR posted this notice in November 2003 to inform the public that it is considering approval of a proposed land disposition under section 21(2) of the *Conservation Authorities Act* (*CAA*) by the Central Lake Ontario Conservation Authority (CLOCA) and to solicit public input over the following one-month period. The notice indicated that the 28 hectares of CLOCA property, known as the Harmony Valley Conservation Area, proposed for sale would be sold to the City of Oshawa for continued passive recreation purposes. The CLOCA proposed to retain the net disposition proceeds in reserve for use on CLOCA priority capital projects, including the future acquisition of high priority, sensitive Oak Ridges Moraine lands.

ECO Comment

- Unacceptable use of an information notice. It is the ECO's opinion that proposals for the disposition of land sales under the *CAA* are prescribed instruments under the *EBR*. Please refer to page 10 of the ECO's 2002/2003 annual report.
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15 of this Supplement.

Grand River Conservation Authority – Approval of Sale, Lease or other means of Disposition of Land by a Conservation Authority – *CAA* s. 21 (2)
EBR Registry #: XB03E3008

Description

- MNR posted this notice in December 2003 to inform the public that it is considering approval of a proposed land disposition under section 21(2) of the *Conservation Authorities Act* (*CAA*) by the Grand River Conservation Authority (GRCA) and to solicit public input over the following one-month period. The notice explained that the GRCA proposed to sell 0.075 hectares of its property to an adjacent church and that the loss of the land would not affect the conservation authority's flood control operation or the adjacent municipal park system.

ECO Comment

- Unacceptable use of an information notice. It is the ECO's opinion that proposals for the disposition of land sales under the *CAA* are prescribed instruments under the *EBR*. Please refer to page 10 of the ECO's 2002/2003 annual report.
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15 of this Supplement.

Ministry of Northern Development and Mines (MNDM) – Instruments

Amendments to Certified Closure Plans
EBR Registry #s:
XD03E1008 – Inco – McCreedy West Mine, City of Sudbury
XD03E1009 – Placer Dome – Dome Mine, Timmins
XD03E1010 – Goldcorp Inc. – Red Lake Mine, Kenora District
XD04E0001 – Larchex Inc. – Alexo Mine, Dundonald and Clergue Townships

Description

- Under the *Mining Act*, mining companies must submit a Closure Plan, which proposes rehabilitation measures to be implemented upon the eventual closure of the operation, for filing by MNDM.
- Certified Mine Closure Plan Amendments may be filed by a proponent or ordered by a Director.

ECO Comment

- Acceptable use of an information notice.
- MNDM should have included references to the section of the *Mining Act* under which the amendments were submitted in all notices; it did so only in XD03E1009. The ministry also should have provided more information in the notices on why MNDM is not required to post amendments to certified closure plans as regular notices on the Registry.

Ministry of the Environment (MOE) – Policies

Final Report of the Advisory Committee on Watershed-based Source Protection Planning: "Protecting Ontario's Drinking Water: Toward a Watershed-based Source Protection Planning Framework"

EBR Registry #: XA03E0011

Description

- MOE posted this notice in April 2003 to advise the public and interested parties that the final report of the Advisory Committee on Watershed-based Source Protection Planning: "Protecting Ontario's Drinking Water: Toward a Watershed-based Source Protection Planning Framework" had been submitted to the Minister of the Environment. The report sets out a comprehensive framework that addresses roles and responsibilities, the planning process, resources, timing and legislation, which can be applied to all watersheds in Ontario. It includes 55 recommendations and emphasizes that implementation and technical issues will need to be dealt with in more detail as the planning process moves forward. The notice indicated that the government would be accepting public comments on the report for two months following the date of posting.
- In February 2004, MOE posted notice of its White Paper on Watershed-based Source Protection Planning on the Registry as a regular notice (PA04E0003). The White Paper was developed to consult with Ontarians on the government's proposed approach to the development of a watershed-based source protection process.

ECO Comment

- Acceptable use of an information notice.

Proposal to Adopt a Canada-wide Standard for Dioxin and Furan Emissions from Conical Municipal Waste Combustors

EBR Registry #: XA03E0008

Description

- MOE posted this notice in June 2003 to inform the public of its plans to adopt a Canada-wide Standard for dioxin and furan emissions from conical municipal waste combustors. Dioxins and furans are released into the environment as a result of the burning of municipal waste in the combustors. Conical waste combustors are unique to Newfoundland-Labrador where over 40 exist. The standard proposes to phase out the operation of conical waste combustors in Newfoundland-Labrador by 2008, and prohibit the operation of new facilities anywhere in Canada, effective when ministers sign the standard.
- The notice indicated that there are no conical municipal waste combustors in Ontario and that the province already has stringent requirements in place which prevent any from being established.

ECO Comment

- Acceptable use of an information notice.

Accrediting Body for Drinking-water Testing Laboratories under the *Safe Drinking Water Act (SDWA)*
EBR Registry #: XA03E0015

Description

- MOE posted this notice in July 2003 to inform the public that had entered into a three-party agreement with the Standards Council of Canada (SCC) and the Canadian Association for Environmental Analytical Laboratories (CAEAL) to designate the SCC as the accrediting body for drinking-water testing. The agreement addresses the responsibilities of the three parties. The notice indicated that the agreement would come into effect on August 1, 2003, with a five-year renewal term.

ECO Comment

- Acceptable use of an information notice.
- For further information on the *SDWA*, please refer to pages 80-85 of the ECO's 2002/2003 annual report and pages 96-109 of the ECO's 2002/2003 Supplement.

Updated Terms of Reference for Engineers' Reports for Water Works Regulated under O.Reg. 170/03
***EBR Registry #*:** XA03E0017

Description

- MOE posted this notice in December 2003 to inform its stakeholders and the public that it had updated its August 2000 Terms of Reference (TOR) for Engineers' Reports for Water Works to reflect the requirements in the *Safe Drinking Water Act, 2002* and the new Drinking-Water Systems Regulation (O.Reg. 170/03). The TOR was also modified to explain that an Engineer's Report for a municipal residential drinking-water system that receives all of its water from another municipal residential drinking-water system and does not provide may additional treatment shall consist of a letter to the Director.

ECO Comment

- Acceptable use of an information notice.

Ministry of the Environment (MOE) – Regulations

Revocation of one Designation Regulation and 20 Exemption Orders made under the *Environmental Assessment Act*
***EBR Registry #*:** XA02E0008

Description

- MOE posted this notice in April 2003 to inform the public that it had revoked one designation regulation and 20 exemption orders for electricity projects made under *the Environmental Assessment Act (EAA)*. In April 2001, Ontario Regulation 116 (the Electricity Projects Regulation) and Ontario Regulation 117/01 were made under the *EAA*. The notice explained that the effect of the new regulations was to require all electricity projects of the same type to meet the same environmental assessment requirements regardless of who the proponent may be. Previously, the *EAA* applied to all projects undertaken by those bodies named as public bodies in Ontario Regulation 334 under the *EAA* (unless exempted by an order) and to private sector projects if designated by regulation. The new regulations made the existing designation regulation and exemption orders obsolete.

ECO Comment

- Acceptable use of an information notice.
- In January 1998, MOE posted a regular notice under section 16 of the *EBR* to solicit public comment on its proposal to revoke obsolete exemption orders issued under the *Environmental Assessment Act* even though the proposal was deemed to be administrative in nature.

Application of Section 35 of the *Waste Diversion Act* – Brewers Retail Inc.
***EBR Registry* #:** XA03E0009

Description

- In May 2003, MOE posted this notice to inform the public of and solicit comments on its proposal to issue a regulation under the *Waste Diversion Act (WDA)* pertaining to Brewers Retail Inc. Under the proposed regulation, the exemption of Brewers Retail Inc., provided for in section 35 of the Act, would remain active only as long as the retailer continues to operate a deposit-refund system for beer containers and collect all other secondary packaging associated with products listed for sale by the Beer Store. The draft regulation defines "beer container" and "secondary packaging" and the specific conditions under which the exemption would cease to apply.

ECO Comment

- Acceptable use of an information notice.
- On June 20, 2003, MOE posted notice of its decision to prescribe the Act under the *EBR* (RA03E0012). As a result of this decision, environmentally significant regulations developed under the Act in the future will be posted as regular notices under section 16 of the *EBR*.

Administrative Change to Emissions Trading Regulation O.Reg. 397/01 – Application Date for Emission Allowances
***EBR Registry* #:** XA03E0010

Description

- MOE posted this notice in May 2003 to inform the public that it had filed O.Reg. 202/03 to amend O.Reg. 397/01, the Emissions Trading Regulation, on May 16, 2003. O.Reg. 202/03 made two administrative changes to the Emissions Trading Regulation. First, it changed the date by which independent generators may apply to the Director for 2004 nitric oxide and sulphur dioxide emission allowances from June 1 to August 1, 2003. Second, it changed the date by which Ontario Power Generation may apply for 2004 sulphur dioxide emissions allowances from June 1 to August 1, 2003.

ECO Comment

- Acceptable use of an information notice.

Drinking Water Testing Services Regulation made under the *Safe Drinking Water Act*
***EBR Registry* #:** XA03E0006

Description

- MOE posted this notice on June 17, 2003 to advise the public that it had passed O.Reg. 248/03, the Drinking Water Testing Services Regulation, and to convey how the proposed regulation had changed as a result of public consultation. The notice was an update to an information notice posted on the Registry on March 25, 2003, which sought public input on the proposed regulation.
- The regulation sets out a number of licencing requirements for laboratories providing drinking water testing services, including requirements in the areas of: application process for licences; licence expiry and renewal; conditions of holding a licence; and acceptable drinking water testing protocols.

ECO Comment

- Acceptable use of an information notice.
- On June 20, 2003, MOE posted notice on the Registry of its decision to prescribe the *SDWA* under the *EBR* (RA03E0012). As a result of this decision, environmentally significant regulations developed under the Act in the future will be posted as regular notices under section 16 of the *EBR*.

Regulation to amend Nutrient Management General Regulation, O.Reg. 267/03
EBR Registry #: XA03E0007

Description

- MOE posted this notice in December 2003 to inform the public that it had filed O.Reg. 447/03 to amend O.Reg. 267/03, the Nutrient Management General Regulation under the *Nutrient Management Act (NMA)*. The notice stated that O.Reg. 447/03 makes amendments which are administrative in nature. It "deals with technical and legal revisions that provide further clarification and refinement of the regulation [O.Reg. 267/03]." The changes include the addition of definitions to explain terms used in the regulation and the removal of definitions where language can be more clearly set out in the regulation. O.Reg. 447/03 clarifies several requirements, such as the approval requirements for farms with the capacity of the barn to hold livestock that would produce at least 150 Nutrient Units.
- The notice indicated that a number of protocols, including those for sampling and analysis, and construction and siting, had also been updated to reflect O.Reg. 447/03.
- The notice stated that extensive consultation by the Ministry of Agriculture and Food (OMAF) and MOE on standards, regulations and protocols had taken place in a series of public dialogues and sessions that had been ongoing since 2000.

ECO Comment

- Acceptable use of an information notice. The ECO agrees that the changes clarified O.Reg. 267/03 and are consistent with our understanding of the original intent of the regulation. The ECO also agrees that O.Reg. 267/03 had been subject to extensive public consultation and does not believe that consultation on the amendment would have resulted in significant new information coming forward. For further information on the amended O.Reg. 267/03, please refer to pages 74-78 of the ECO's 2003/2004 annual report and pages 47-55 of the Supplement.
- Although the *NMA* is not prescribed under the *EBR*, the government has committed to posting relevant proposals on the Registry. The ECO has urged OMAF to prescribe the *NMA* under the *EBR* to make the Act's new regulations subject to notice and comment on the Registry. For further information on the *NMA*, please refer to pages 68-72 of the ECO's 2002/2003 annual report and pages 29-38 of the Supplement.

Ministry of the Environment (MOE) – Instruments

Application for a Permit to Take Water
EBR Registry #: XA03E0012

Description

- MOE posted this notice on June 30, 2003 to inform the public of its proposal to issue a Permit to Take Water (PTTW) to the Regional Municipality of York and to solicit public input on the proposed instrument over the following 15-day period. The municipality applied for the PTTW for the purpose of dewatering the subsurface so that a tunnel for a segment of sewer pipe in Markham could be constructed. The PTTW would allow the municipality to build a segment of the sewer along 16th Avenue from Stone Mason Drive to a point 300 m east of Woodbine Ave.
- The notice stated that the municipality indicated in its application that some water wells in the area will be affected by lowered water levels, but that, as a condition of the proposed permit, water and other remedies will be provided by York Region to residents whose wells may be affected.
- The planned sewer pipe construction is an undertaking which is subject to the requirements of the *Environmental Assessment Act (EAA)*. The undertaking was planned according to the Municipal Class Environmental Assessment process, and was completed in early 2002.

ECO Comment

- Acceptable use of an information notice.
- For further discussion of this notice and the exemption of instruments for undertakings approved under the *EAA* from posting regular notices on the Registry (the *EBR* section 32 exception), please refer to pages 52-59 of this year's annual report.

Minister's Order for Drinking Water Testing Licence Fees
EBR Registry #: XA03E0013

Description

- MOE posted this notice in July 2003 to inform the public of a Minister's Order establishing the fees schedule for the issuance or renewal of drinking-water testing licences. The Drinking Water Testing Services Regulation set out the licencing requirements in many areas, but classes of licence and associated fees were not included as part of that regulation. The notice indicated that five classes of licence had been established through the order: microbiological; inorganic chemical; organic chemical; radioanalytical; and other. It also indicated that the proposed basic fee is $1000 per year per test class, with additional test classes added at a cost of $250 per class.

ECO Comment

- Acceptable use of an information notice.
- The notice should have clearly stated whether the Minister's Order is at the proposal or the decision stage.
- Please refer to entry XA03E0006 above for a review of the Drinking Water Testing Services Regulation.

The City of Quinte West
EBR Registry #: XA03E0016

Description

- MOE posted this notice in October 2003 to inform the public that a Report of the Director was re-issued on July 15, 2002 to the City of Quinte West to take all steps necessary to operate and maintain the water works servicing the Trenton Mobile Trailer Park in accordance with provincial law and regulations. MOE indicated that it was necessary to re-issue the report because the owner had not complied with legislation and was in non-compliance with a Provincial Officer's Order for operation of the water works.
- This was the fourth issuance of the report: it was issued on March 16, 2001 (the subject of an information notice posting in March 2001), on March 4, 2002 (the subject of an information notice posting in March 2002) and on July 15, 2002 (the subject of an information notice posting in July 2002).

ECO Comment

- Acceptable use of an information notice provided the instrument was issued in accordance with other statutory decisions, including those made under the *Environmental Assessment Act (EAA)*.
- MOE should have provided clearer information on the *EAA* approval or exemption being referred to so that the reader could understand whether or not an approval under the *EAA* had been granted for the water works.
- MOE should have indicated the date on which the most recent report had been issued.

Adams Mine Permit to Take Water
EBR Registry #: XA03E0019

Description

- MOE posted this notice in November 2003 to provide notice of a draft Permit to Take Water (PTTW) for Adams Mine Railhaul and to solicit public input. The draft, two-year PTTW was for the de-watering of the south pit at the Adams Mine. It was drafted based on a technical review of the proponents' application and supporting material which were provided through a link in the notice. The notice indicated the proposed permit is a step towards implementing an undertaking that had been previously approved under the *Environmental Assessment Act (EAA)*.
- The notice also stated that any submissions received, related to the specifics of the application and the proposed draft PTTW, would be considered in the context of the Director's authority under the *Ontario Water Resources Act* and the regulations and that the final decision would be posted on the Registry as an information notice.

ECO Comment

- Acceptable use of an information notice.
- The ECO commends MOE for providing a link to the draft permit, the application and the applicants' supporting documents.
- For further discussion of this notice and the exemption of instruments for undertakings approved under the *EAA* from posting regular notices on the Registry (the *EBR* section 32 exception), please refer to pages 52-59 of this year's annual report.

Written Submissions on the Draft Permit to Take Water for Adams Mine
***EBR* Registry#:** XA04E0002

Description

- MOE posted this notice in January 2004 to provide an update on the process of reviewing the application by Adams Mine Railhaul for the two-year Permit To Take Water (PTTW) from the south pit of Adams Mine (please refer to XA03E0019 above). The notice indicated that over 23,000 written submissions were received on the draft permit and that a full review of the submissions was underway. MOE estimated that the review would take several months to complete.
- The notice provided a link to Ontario Regulation 285/99 under the *Ontario Water Resources Act*, which outlines what a Director must and may consider when making a decision on issuing a PTTW. It also referred to some of the approvals and authorizations required before the proponent can develop the site as a landfill for solid non-hazardous waste.

ECO Comment

- The ECO commends MOE for providing this update and for clearly laying out the procedure to be followed.
- MOE could have included a link to the draft PTTW (XA03E0019).

Replacement Permit to Take Water for OMYA
EBR Registry #: XA04E0001

Description

- MOE posted this notice in February 2004 to inform the public that it had issued a replacement Permit to Take Water (PTTW) for OMYA Canada Inc. on January 9, 2004. The decision to revoke and replace OMYA's original PTTW was made in accordance with the mandatory requirements of Ontario Regulation 434/03. The change to the PTTW involved the amount of the water taking. The original PTTW permitted OMYA to take up to 1,483 cubic metres of water per day from the Tay River until January 31, 2003 and up to 4,500 cubic metres of water per day from the river after December 31, 2003, if certain conditions were met. The replacement PTTW allows for the taking of only 1,483 cubic metres of water beyond December 31, 2003.

ECO Comment

- Acceptable use of an information notice. The decision brought OMYA's PTTW in line with the requirements of Ontario Regulation 434/03.
- For further information on Ontario Regulation 434/03 please refer to the emergency exception notice entry (RA03E0035) in the Exception Notices section in this Supplement.

Proposal to issue Permit to Take Water to the Regional Municipality of York for Dewatering for the Purposes of Sewer Tunnel Construction
EBR Registry #: XA04E0004

Description

- MOE posted this notice in March 2004 to inform the public of its proposal to issue a Permit to Take Water (PTTW) to the Regional Municipality of York and ConDrain Company 1983 Limited and to solicit public input. The municipality and the company applied for the PTTW for the purpose of dewatering the subsurface to construct a tunnel and trenches for a sewer pipe in Markham. The PTTW, effective March 2004 to March 2005, would allow the municipality to construct the segment of the sewer pipe along 9th Line from a point just north of Little Rouge Creek to a point just north of 19th Avenue.

- The notice stated that the application indicated that some water wells in the area may be affected by lowered water levels and that the municipality has implemented a 24-hour complaint response program to address affected residents. Residential wells expected to be affected for more than three to four months had been deepened or replaced with deeper wells. Residents whose wells were expected to be affected for less than three months were to be provided with bottled water and tanks and bulk water delivery.
- The notice indicated that the undertaking is subject to the requirements of the *Environmental Assessment Act (EAA)*. The undertaking was planned according to the Municipal Class Environmental Assessment process, and was completed in December 1999. It also indicated that the application for another PTTW for the construction of another segment of the sewer in Markham (the subject of XA03E0012 posted on June 30, 2003) was still under review at that time.

ECO Comment

- Acceptable use of an information notice.
- For further discussion of this notice and the exemption of instruments for undertaking's approved under the *EAA* from posting regular notices on the Registry (the *EBR* section 32 exception), please refer to pages 52-59 of this year's annual report.

Ministry of Transportation (MTO) – Policy

Mid-Peninsula Transportation Corridor Environmental Assessment Terms of Reference

EBR Registry #: XE03E4511

Description

- MTO posted this notice in May 2003 to inform the public that it had recently submitted the Environmental Assessment Terms of Reference (TOR) for the Mid-Peninsula Transportation Corridor in the Niagara Region to the Ministry of the Environment (MOE) for formal review under the *Environmental Assessment Act*. The notice indicated that MOE would be accepting public comments on the TOR over the following month.
- MTO had posted an information notice in July 2001 (PE01E4502) to notify the public of the completion of the needs assessment for the undertaking.

ECO Comment

- Unacceptable use of an information notice. In 2001, the ECO informed ministries prescribed under the *EBR*, including MTO, of its opinion that a proposed TOR meets the definition of a policy under the *EBR* and therefore a regular Registry notice would be appropriate.
- Please refer to the ECO's 2001/2002 Supplement for a review of PE01E4502.
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 17 of this Supplement.

Ministry of Health and Long-Term Care (MOHLTC) – Regulations

New Provision respecting Dental Amalgam Waste Disposal included in General Regulation under the *Dentistry Act, 1991*

EBR Registry #: XG03E0001

Description

- MOHLTC posted this notice in June 2003 to inform the public that it had amended the General Regulation under the *Dentistry Act* to include a new section on dental amalgam waste disposal. The amendment requires that each member who owns or controls a dental practice in Ontario in which dental amalgam is placed, repaired or removed to: have a properly installed dental amalgam device, which meets or exceeds certain standards; ensure that the amalgam is disposed of properly; and ensure that the Royal College of Dental Surgeons of Ontario's standard of practice regarding dental amalgam waste disposal is complied with. Dentists who do not own or control a practice are expected to take all reasonable steps to ensure the Standard of Practice is complied with.

- The notice indicated that the amendment supports the federal/provincial commitment to nationally reduce 95 per cent of mercury release from dental amalgam waste discharges to the environment by 2005, and will make all Ontario dentists compliant with the Canada-wide Standard on Mercury for Dental Amalgam Waste.

ECO Comment

- Acceptable use of an information notice. The notice provided an important public service to Registry users.

Ontario Regulation made under the *Health Protection and Promotion Act* – Public Spas
EBR Registry #: XG04E0007

Description

- MOHLTC posted this notice in January 2004 to invite the public to comment on its proposed regulation of public spas. The proposed regulation defines the requirements for the operation of new and existing hot tubs, spas and whirlpools to prevent/minimize the risk of illness, injury or death.

ECO Comment

- Acceptable use of an information notice.
- The *Health Protection and Promotion Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposals on the Registry.

Environmental Commissioner of Ontario (ECO) – Policy

Pre-Consultation for a Ten-Year Review of the *Environmental Bill of Rights*
EBR Registry #: XQ04E0001

Description

- The ECO posted this notice on March 31, 2004 to inform interested individuals and groups of an opportunity to provide input into a review of the *Environmental Bill of Rights (EBR)* between March 31 and May 21, 2004. The public was invited to respond to any or all of a series of questions, in either electronic format or in hard copy, about aspects of the *EBR* that are working well and aspects of it that could be enhanced. The notice indicated that input received through the pre-consultation process would help scope a review of the *EBR* that would take place over the coming months. The notice also indicated that an independent consulting firm would receive the questions on an arms-length basis on behalf of the ECO in order to keep responses confidential.

ECO Comment

- Acceptable use of an information notice.

SECTION 3

ECO REVIEWS OF MINISTRIES' USE OF EXCEPTION NOTICES IN 2003/2004

SECTION 3: ECO REVIEWS OF EXCEPTION NOTICES

Use of Exception Notices

In certain situations, the *EBR* relieves provincial ministries of their obligation to post environmentally significant proposals on the Registry for public comment.

There are two main instances in which ministries can post an "exception" notice to inform the public of a decision and explain why it was not posted for public comment. First, ministries are able to post an exception notice under section 29 of the *EBR* when the delay in waiting for public comment would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property (the "emergency" exception). Second, ministries can post an environmentally significant proposal as an exception notice under section 30 of the *EBR* when the proposal will be or has already been considered in another public participation process that is substantially equivalent to the requirements of the *EBR* (the "equivalent public participation" exception).

Quality of Exception Notices

Ministries should strive to ensure that notices use plain language and precise explanations, and provide an adequate level of detail. Ministries should ensure that all notices include the name, address, phone number and fax number of a ministry contact person. Ministries should also strive to post exception notices promptly after decisions are made.

Emergency Exceptions under Section 29(1) of the *EBR*

Ministry of the Environment (MOE) – Regulations

New Regulation [153/03] under the *Ontario Water Resources Act (OWRA)* prohibiting Issuance of certain types of new Permits to Take Water (PTTW) in the Niagara Escarpment and Oak Ridges Moraine
and
Amendment to Regulation 153/03 under the *Ontario Water* Resources *Act (OWRA)*, extending the Prohibition regarding certain types of new Permits to Take Water (PTTW) in the Niagara Escarpment and Oak Ridges Moraine to March 1, 2004
***EBR Registry* #s:**RA03E0014 and RA03E0034

Description

- MOE posted the first notice (RA03E0014) in April 2003 to inform the public that it had issued Ontario Regulation 153/03, a new regulation under the *OWRA*, to protect two provincially significant areas while it undertook public consultation prior to making regulatory amendments to the Water Taking and Transfer Regulation and related program improvements. The regulation prohibited the issuance of new PTTW in the Niagara Escarpment and the Oak Ridges Moraine for: beverage manufacturing; fruit or vegetable canning or pickling; ready-mix concrete manufacturing; and the manufacturing or production of products that contain some or all of the water that is taken. The conditions under which the prohibition would not apply to are: persons with a valid PTTW; renewals of existing permits from the same location and for the same purpose; and permits for agricultural purposes and other types of uses that do not manufacture or produce a product that contains all or some of the water that is taken. The regulation was to be effective March 1, 2003 to August 31, 2003.

- MOE posted the second notice (RA03E0034) in August 2003 to inform the public that it had issued Ontario Regulation 357/03, an amending regulation under the *OWRA*, to extend the prohibition date enshrined in Ontario Regulation 153/03 from August 31, 2003 to March 1, 2004.
- Both notices stated: "The urgency to implement this regulation did not allow for public comment."

ECO Comment

- The ECO is not convinced that these situations constituted an emergency under section 29 of *EBR*.
- MOE could have provided a link to its notice about its proposed amendments to the Water Taking and Transfer Regulation and improvements to the Permit to Take Water program which was posted on the Registry as a regular notice on the same day (RA03E0009).
- In December 2003 MOE posted another emergency exception notice on the Registry (see RA03E0035 below) to inform the public that it had issued Ontario Regulation 434/03 which established a moratorium on new or expanding PTTW under the *OWRA* for water takings located in Southern Ontario and areas for which Conservation Authorities have been established in Northern Ontario for a period of one year.

Regulation under the *Pesticides Act*: Technician/Trainee Supervision by Mosquito/Biting Flies licensed Exterminators

EBR Registry #: RA03E0023

Description

- MOE posted this notice in May 2003 to inform the public that it had issued a regulation to amend Regulation 914, the general regulation under the *Pesticides Act*, to assist local health units in implementing larviciding programs to address the West Nile virus. The amending regulation increased the number of applicators authorized to apply larvicides for mosquito control in Ontario by increasing, from three to seven, the maximum number of technicians and trainees a licenced exterminator (holding a Mosquito Biting Flies licence) is permitted to supervise.
- The notice stated: "A delay in proceeding with this regulatory amendment could pose a risk to public health."

ECO Comment

- Acceptable use of an emergency exception notice.
- MOE could have indicated the effective date of the regulation. It also could have updated the notice to include a link to the amended regulation once it became available through Ontario's e-laws Web site.
- For further information on larviciding programs, please refer to page 6 of this year's Supplement.

Regulation to exempt Projects for the Provision of short-term temporary Electricity Capacity to meet Peak Demand using Mobile Generators arranged by Ontario Electricity Financial Corporation from the Sound Requirements of the *Environmental Protection Act (EPA)*

EBR Registry **#:** RA03E0028

Description

- MOE posted this notice on June 30, 2003 to inform the public that it had passed a regulation under the *EPA* exempting projects which would provide up to 410 MW of short-term, temporary electricity capacity using mobile generators from the sound requirements of the Act. The notice indicated that the capacity was to be generated by natural gas fuelled generators which would run for a maximum of four hours per day between the hours of 7am and 11pm EST from Monday to Friday, excluding statutory holidays. The generators would be the last to be dispatched when additional capacity was required and the public was to be notified of when they were in use.
- On June 11, 2003, the Ontario Electricity Financial Corporation was granted a Declaration Order to declare that the requirements of the *Environmental Assessment Act (EAA)* not apply to successful bidders. MOE posted the proposed Declaration Order on the Registry as a regular notice in May 2003 (RA03E0021). The decision, posted on June 16, 2003, stated that conditions were placed on the Declaration Order: "Applicants for Certificates of Approval under the *Environmental Protection Act* for the mobile generators shall demonstrate that they meet appropriate provincial requirements for air emissions and noise".

- The notice stated: "The Ministry has used section 29(1) of the *EBR* to post notice of this Exception as the delay in giving notice to the public would result in difficulties in providing the reserve margin to assure greater reliability of electricity supply in the event of unexpectedly tight supply conditions arising from extreme weather or unanticipated operating problems. If this regulation was posted for a minimum of 30 days on the Environmental Registry, there may be injury, or damage to any person or property."

ECO Comment

- The ECO is not convinced that a section 29 emergency notice was warranted and encourages MOE and the Ministry of Energy to improve planning work for future short-term needs.
- The notice did not provide a link to the decision notice on the Declaration Order (RA03E0021).
- The ministry was not required to post notice of the C of A for air emissions as the instrument was for an undertaking exempted under the *EAA*. For further discussion of the exemption of instruments for undertakings approved or exempted under the *EAA* from posting regular notices on the Registry (the *EBR* section 32 exception), please refer to pages 52-59 of this year's annual report.

Regulation establishing a Moratorium on new or expanding Permits to Take Water (PTTW) under the *Ontario Water Resources Act (OWRA)* for Water Takings located in Southern Ontario and areas for which Conservation Authorities have been established in Northern Ontario
***EBR Registry#*:** RA03E0035

Description

- MOE posted this notice in December 2003 to inform the public that it had passed a regulation establishing a moratorium on new or expanding PTTWs under the *OWRA*. The moratorium was to apply to a number of industries located in Southern Ontario and in areas for which Conservation Authorities have been established in Northern Ontario including: beverage manufacturing; fruit or vegetable canning or pickling; ready-mix concrete manufacturing; aggregate processing where the aggregate and the water taken is incorporated into a product in the form of a slurry; and the manufacturing or production of products which contain more than 50,000L/day of the water that is taken. The moratorium was not to apply to: municipalities; water taken for agricultural purposes; and renewals of existing permits for the same volume, location and purpose.
- The notice stated that: "The urgency in implementing this regulation did not allow for public comment in order to ensure that there is no serious risk of harm to the Province's water resources while the ministry proceeds with the following two initiatives: (a) a review of the decision-making process and rules governing the Permit to Take Water Program, and, (b) advancing the implementation of Commissioner O'Connor's recommendations in relation to source protection."

ECO Comment

- The ECO is not convinced that the situation constituted an emergency under section 29 of *EBR*.
- MOE received over 20 comments related to the regulation from a range of groups both supportive of and opposing the regulation. Commenters included industries captured by the regulation, industries not captured by the regulation, municipalities, environmental non-governmental organizations and private citizens. Commenters raised concerns about: the failure of MOE to consult on the regulation; the impact of regulation on industries captured by it; enforcement of regulation; and the moratorium not being long enough to establish a new set of rules and information to guide the PTTW program. Many commenters congratulated the ministry for passing the regulation, while others requested clarification of particular issues, such as the industries to which the regulation applies.
- Please refer to the related emergency exception notices RA03E0014 and RA03E0034 above.

Ministry of the Environment (MOE) – Instruments

***EPA* s. 18 – Order for Preventative Measures**
EBR Registry #: IA03E0496

Description

- MOE posted this notice in April 2003 to inform the public that it had issued an Order for preventative measures to 1329147 Ontario Ltd., the owner of a property located in the City of Ottawa. The Order required the owner to operate and maintain an on-site groundwater treatment system.
- The notice indicated that: "Any delay in issuing this Order could have a negative impact on neighbouring properties. The delay would impact the Ministry's ability to continue the operation of the on-site treatment system. Continued operation of the on-site treatment is necessary to ensure the contaminants from the subject property do not migrate off site."

ECO Comment

- Acceptable use of an emergency exception notice.
- Although the notice provided a link to the Order, MOE could have provided more information in the body of the notice about the nature of the contamination, why there was a risk that the owner would cease to operate the treatment system or operate it properly and why it was necessary to post an emergency notice.

***EPA* s. 27 – Approval for a Waste Disposal Site**
EBR Registry #: IA03E0601

Description

- MOE posted this notice on May 6, 2003 to inform the public that it had issued six temporary emergency approvals to waste transfer stations operated by Canadian Waste Services Inc. The City of Toronto, Regional Municipality of Peel and Canadian Waste Services Inc. had requested the approvals to address a seasonally high volume of waste being received at the City of Toronto's seven waste transfer sites. All of the approvals were to expire on May 30, 2003 unless the City of Toronto reconfirmed the emergency situation and further written approval of the Director was obtained.
- The notice indicated that: "A delay in issuing these emergency approvals may have resulted in a significant risk or harm to the environment, property and public health. If prevented from utilizing approved waste management facilities, the City of Toronto would have no legal alternatives for waste disposal. Without proper waste management, there could have been a risk of illegal dumping, increase in vermin, disease and destruction of property."

ECO Comment

- Acceptable use of an emergency exception notice.
- The notice should have indicated the date on which the instrument became effective. It also should have included ministry contact information.

***EPA* s. 27 – Approval for a Waste Disposal Site**
EBR Registry #: IA03E0752

Description

- MOE posted this notice in May 28, 2003 to inform the public that it had issued temporary emergency approvals to three of Canadian Waste Services Inc.'s landfill sites in the province to handle some of the City of Toronto's residential waste. Waste transfer stations in the city were reaching their full storage capacity due to a temporary closure of the Canada/USA border to Canadian waste shipments on May 20, 2003 and an increase in security resulting in delays, in the days that followed. The approvals, which came into effect on May 21, 2003, were to expire on May 30, 2003 unless the emergency situation was reconfirmed and further written approval of the Director obtained.
- The notice indicated that: "A delay in issuing these emergency approvals may have resulted in a significant risk or harm to the environment, property and public health. If prevented from utilizing approved waste

management facilities, the City of Toronto would have no legal alternatives for waste disposal. Without proper waste management, there could have been a risk of illegal dumping, increase in vermin, disease and destruction of property."

ECO Comment

- Acceptable use of an emergency exception notice.
- The notice should have indicated the date on which the instrument became effective. It also should have included ministry contact information.

EPA s. 18 – Order for Preventative Measures
EPA s. 43 – Order for Removal of Waste and Restoration of Site
EPA s. 44 – Order for Conformity with Act for Waste Disposal Sites
EBR Registry #: IA03E0815

Description

- MOE posted this notice in July 2003 to inform the public that it had issued an Order to the owners of the Otterwood tire site in Norwich Township requiring them to expeditiously remove the 350,000 used tires stored illegally on the site. The Order was issued pursuant to three sections of the Act: *EPA* s. 18 (Order for preventative measures); *EPA* s. 43 (Order for removal of waste and restoration of site); and *EPA* s. 44 (Order for conformity with Act for waste disposal sites).
- The notice indicated that there are no requirements for the ministry to consult the public through the Registry when it issues Orders under sections 43 and 44 of the *EPA*. While Orders issued under section 18 of the *EPA* are required to be posted on the Registry as proposal notices for public consultation, the ministry explained that it was using this section to address an emergency situation. Local health authorities had indicated the need to clean up the site because of concerns about the possible spread of West Nile virus. The notice also cited ministry concerns about potential fire and environmental hazards resulting from the illegal stockpiling.
- The notice explained that the ministry would take the actions detailed in the Order and recover the costs from the owners if the owners failed to provide satisfactory evidence of their intention to do the work in short order, or if they failed to adhere to the timeline provided in the Order.
- The notice indicated that leave to appeal provisions under the *EBR* would not apply as the Order was not posted as a proposal notice.

ECO Comment

- Acceptable use of an emergency exception notice.
- MOE's statement that there are no requirements for the ministry to consult the public through the Registry when it issues Orders under sections 43 and 44 of the *EPA* is incorrect. Orders under these sections of the *EPA* are Class II instruments under O.Reg. 681/94 of the *EBR*.
- The notice should have indicated the date on which the instrument became effective.

EPA s. 9 – Approvals for Discharge into the Natural Environment other than Water (i.e. Air)
EBR Registry #s: IA03E0974, IA03E1720 and IA04E0161

Description

- In July 2003, MOE posted an emergency exception notice (IA03E974) relating to a temporary Certificate of Approval (C of A) for air for two of Maple Leaf Food's Rothsay rendering plants. The C of A allowed for the collection and storage of deadstock, and for emissions produced in the combustion of tallow, being used as a fuel at Rothsay's Dundas and Moorefield Plants. The notice indicated that there was an immediate risk that large numbers of dead animals unwanted by the rendering industry would be buried or improperly disposed. The bovine spongiform encephalopathy (BSE) crisis in Britain and the single case of BSE in Alberta in May 2003 had resulted in trade embargoes on ruminant products and a crisis situation for the markets for all beef products. The notice indicated that the ministry used the emergency exception notice as the delay in giving notice to the public and allowing for public participation would result in Rothsay no longer accepting ruminant deadstock. According to MOE, "If the company is not able to obtain the necessary approvals in a timely manner, they may be forced for business reasons to refuse to accept ruminant deadstock." The notice included a summary of some comments received from the public and MOE's response to them.

- In November 2003, an emergency exception notice (IA03E1720) was issued to inform the public that an additional C of A had been issued to extend the expiry date of the temporary C of A.
- In February 2004, MOE issued a third emergency exception notice (IA04E0161) indicating that the expiry date of the temporary C of A had been extended again. The notice also indicated that the proponent had applied for a permanent C of A for the Dundas plant and provided a link to the regular proposal notice (IA03E1811) which described the proposal. The February 2004 notice indicated that the extension of the C of A was necessary as the comment period on IA03E1811 had only recently ended. The ministry required additional time to duly consider the many public comments received and to properly evaluate the proposal.

ECO Comment

- Acceptable use of an emergency exception notice.
- In April 2004, MOE posted a fourth emergency exception notice to extend the expiry date of the temporary C of A again (IA04E0604). The notice indicated that the extension of the temporary C of A was necessary due to the many comments received on the proposal for the permanent C of A.
- The notices should have indicated both the effective and the expiry dates for each of the three temporary Cs of A issued. The November 2003 and February 2004 notices could have also provided links to the earlier related notices.

***EPA* s. 27 – Approval for a Waste Disposal Site**
EBR Registry #: IA03E1323

Description

- MOE posted this notice on September 17, 2003 to inform the public that it had granted St. Thomas Sanitary Collection Service Limited an emergency approval to accept additional waste from the City of Toronto at its Green Lane Landfill Site in Southwold. Under the emergency approval, the landfill site was permitted to receive waste from the city's transfer stations at a rate of up to 1,500 tones per day from September 11, 2003 to October 18, 2003, to a maximum of 12,000 tonnes. This rate was over and above the annual rate of transfer the landfill site had allocated to the city based on the total amount it was permitted to receive from all generators as specified in its Certificate of Approval.
- Due to difficulties in trucking waste to Michigan for disposal, the city began sending limited amounts of waste to its final disposal at the Green Lane Landfill Site on August 27, 2003. However, on September 5, 2003 the owners of the site advised the city that the site could no longer receive the city's waste as the remainder of its annual capacity was already committed to other generators. The landfill site owners and the city subsequently requested that the site be permitted to receive additional waste from the city. The city advised MOE that the emergency approval was necessary to reduce the amount of waste that had accumulated in its transfer stations and that storage of large amounts of waste could result in a serious risk to the health and safety of the public and the environment.

ECO Comment

- Acceptable use of an emergency exception notice.

***EPA* s. 9 – Approval for Discharge into the Natural Environment other than Water (i.e. Air)**
EBR Registry #: IA03E1401

Description

- MOE posted this notice in October 2003 to inform the public that it had issued a temporary emergency amendment to TransAlta's Certificate of Approval for its Ottawa Health Cogeneration Plant, effective August 15, 2003 through to and including August 25, 2003. The amendment permitted the plant to increase its electricity output to help address the emergency electricity supply conditions that existed immediately following the power outage in Ontario. The notice indicated that the Independent Electricity

Market Operator had requested TransAlta to supply maximum electrical output from the plant during that time.

ECO Comment

- Acceptable use of an emergency exception notice.
- There was a one and a half month delay in posting this emergency exception notice.

***EPA* s. 27 – Approval for a Waste Disposal Site**
Regional Municipality of Peel
EBR Registry #s: IA04E0036 and IA04E0135

Description

- MOE posted the first notice on January 13, 2004 to inform the public that it had issued two temporary emergency Certificates of Approval (Cs of A) for two waste management facilities owned by Canadian Waste Services Inc. at the request of the Regional Municipality of Peel and the waste management corporation. Due to cold weather, municipal waste had become frozen in the trailers used to haul waste from Toronto to Michigan, leaving many of the trailers full and unoperational. The emergency Cs of A were issued to handle the up to 500 tonnes of Peel's waste that would normally be disposed of in Michigan by the City of Toronto. The Cs of A were to expire on January 23, 2004, unless the Regional Municipality of Peel reconfirmed the emergency situation and obtained further written approval of the Director.
- On January 28, 2004, MOE posted the second notice to inform the public that it had extended the emergency approvals issued to Canadian Waste Services Inc. (renamed Waste Management of Canada Corporation at the request of the Regional Municipality of Peel and the waste management corporation). The amended emergency Cs of A were to expire on March 23, 2004, unless the Regional Municipality of Peel reconfirmed the emergency situation and obtained further written approval of the Director.
- Both notices stated: "If prevented from utilizing approved waste management facilities, the Regional Municipality of Peel would have no legal alternatives for waste disposal. Without proper waste management, there could have been a risk of illegal dumping, increase in vermin, disease and destruction of property." Both notices indicated that the local community may experience increased truck traffic. However, the corporation and the city committed to work with the facilities to ensure that any impacts would be minimized.

ECO Comment

- Acceptable uses of emergency exception notice.
- The notices should have indicated the dates on which the instruments became effective.
- The second notice could have included a link to the emergency exception notice about the original C of A (IA04E0036).

Equivalent Public Participation Exception under Section 30(1) of the *EBR*

Ministry of Natural Resources (MNR) – Act

Kawartha Highlands Signature Site Park Act, 2003
EBR Registry #: AB03E4001

Description

- MNR posted this notice in June 2003 to inform the public that the Ontario government had passed the *Kawartha Highlands Signature Site Park Act* that month. The notice indicated that the Act designates the Kawartha Highlands Signature Site as a provincial park, establishing the primacy of protecting its ecological integrity. The Act also protects traditional non-industrial activities, provides private property assurances and permits continued access to current Crown land tenure holders. It establishes a Management Advisory Board that will have a substantial role in management planning and implementation and ensures that decisions with respect to the development of the management plan and major revisions will be made with prior public consultation.
- The notice indicated that the environmentally significant aspects of the proposal had already been considered in a process of public participation under the *EBR* or any other Act that was substantially equivalent to the process required under the *EBR*. In July 2000, the Minister of Natural Resources appointed a Local Stakeholder Committee (LSC) to undertake public consultation on the site and provide recommendations on the appropriate protection designation for the area, final boundaries, permitted activities and a stewardship model. Throughout the process open houses were held and an *EBR* notice was posted and updated several times, including to solicit public comment on the LSC's draft Recommendations Report (PB00E3003). In December 2002, after reviewing the final Recommendations Report, the Minister of Natural Resources introduced the *Recreation Reserve Act, 2002* and posted an *EBR* notice about it (AB02E4002). The Act proposed a new protected area designation for the site. Numerous public comments both for and against the *Recreation Reserve Act* were received by the ministry. However, when the legislature prorogued in March 2003, the Bill died on the order paper and could not become law. Due to the strong opinions of key stakeholders it became clear to the government that further discussion was required to find a broadly acceptable solution for the site. In March 2003, MPP Chris Hodgson was appointed to reach a consensus with stakeholders on appropriate levels of protection and traditional uses for the area. Following focused discussions with stakeholders, a Charter outlining a broad framework for the management of the area was developed. The notice indicated the *Kawartha Highlands Signature Site Park Act* is based substantially on the recommendations of the LSC and the Charter.

ECO Comment

- Acceptable use of an equivalent public participation exception notice.
- Please refer to pages 88-94 of this year's annual report and pages 139-146 of the Supplement for further information on the Kawartha Highlands Signature Site.

Ministry of Natural Resources (MNR) – Regulations

Establishing/Modifying Parks, Conservation Reserves, Nature Reserves Under Ontario's Living Legacy (OLL) Land Use Strategy (LUS)

***EBR* #/Description**	
RB00E1001 –	Establishing 26 Conservation Reserves and an addition to an existing Conservation Reserve
RB00E1002 –	Establishing 4 Provincial Parks and additions to 4 existing Provincial Parks
RB01E1003 –	Establishing 1 Provincial Park and additions to 3 existing Provincial Parks
RB03E2001 –	Establishing 8 new Conservation Reserves
RB03E2002 –	Establishing 2 new Provincial Parks and 2 additions to existing Provincial Parks
RB01E1002 –	Establishing 28 Conservation Reserves
RB02E1001 –	Establishing 3 Conservation Reserves

RB02E1002 – Establishing 1 Provincial Park and additions to 2 existing Provincial Parks
RB02E1004 – Establishing 4 new Provincial Parks
RB02E1005 – Establishing 6 new Conservation Reserves
RB03E2003 – Establishing 4 new Provincial Parks and additions to 2 existing Provincial Parks
RB03E3001 – Establishing 1 new Provincial Park
RB9E6012 – Establishing 8 Provincial Parks and additions to 5 existing Provincial Parks
RB00E2001 – Establishing 76 Conservation Reserves
RB00E2002 – Establishing 16 Provincial Parks
RB01E2001 – Establishing 8 new Provincial Parks and new additions to 3 existing Provincial Parks
RB01E2002 – Establishing 20 new Conservation Reserves
RB02E2001 – Establishing 3 new Conservation Reserves
RB02E2003 – Establishing 2 new Conservation Reserves
RB02E2004 – Establishing 1 new Provincial Park
RB03E1001 – Establishing 1 Provincial Park
RB03E1002 – Establishing 2 Conservation Reserves
RB02E2002 – Establishing 4 new Provincial Parks and 5 additions to existing Provincial Parks
RB04E3001 – Establishing 1 new Provincial Park
RB04E2001 – Establishing 1 new Conservation Reserve

ECO Comment

- The regulations establish or modify parks and conservation reserves set out in Ontario's Living Legacy. Some of the notices are updates. In some cases, the notices' text provide information regarding permitted and prohibited land uses (such as hunting). Each of the notices set out specific reasons for using the section 30 exception. Readers should refer to the notices themselves should they wish further detail. For more information on the nature of these notices, see pages 41-42 of the ECO's 2000/2001 annual report.

SECTION 4

ECO REVIEWS OF SELECT DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS IN 2003/2004

SECTION 4: ECO REVIEWS OF SELECT DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS

MINISTRY OF AGRICULTURE AND FOOD

Review of Posted Decision:
Nutrient Management Regulation 267/03 Amended

Decision Information:

Registry Number: RC02E0001/RC02E0002
Proposal Posted: December 12, 2002
Decision Posted: August 29, 2003
Comment Period: 60 days
Number of Comments: 550
Came into Force: September 30, 2003

Description

Nutrient management has been one of the most contentious issues faced by rural Ontarians in years. Concerns about the scope of the legislation, its economic impact, its complexity and prescriptive nature and its enforcement have been the subject of extensive debate within the agricultural community, municipalities, and environmental groups. The Ministry of Agriculture and Food (OMAF) and the Ministry of the Environment (MOE) have met with numerous groups and individuals across the province and have received hundreds of written submissions since consultation on nutrient management began in 2001. On September 30, 2003, the first regulation, O.Reg. 267/03, under the *Nutrient Management Act, 2002* (*NMA*) came into force. On December 19, 2003, the Ontario government passed O.Reg. 447/03 which amended many provisions of O.Reg. 267/03 including some related to biosolids, certification and licencing and nutrient storage (see Table 4 for additional information.) For the sake of clarity, this decision review covers the amended version of O.Reg. 267/03 and the changes made by the Order in Council 1704/2003 designating monitoring, compliance and enforcement responsibilities for the *NMA*. (For a review of the *NMA*, please see pages 68-72 of our 2002/2003 annual report.)

The *NMA* defines nutrients as materials that are applied to land for the purpose of improving crop growth. Nutrients include commercial fertilizers and compost, materials from agricultural sources such as manure and washwater, and from non-agricultural sources such as biosolids (sewage sludge) from sewage treatment plants and sludge from pulp and paper mills. Similar to livestock operations, sewage treatment plants and pulp and paper mills are required to comply with the regulation. The regulation exempts commercial fertilizers and compost from many of the requirements.

The regulation introduces two new terms to Ontario agriculture – the farm unit and the nutrient unit (NU). The farm unit defines the agricultural operation in terms of the land that it encompasses. An agricultural operation can be defined as multiple farm units if the conditions in the regulation are met. However, for the purpose of this

How big is 300 Nutrient Units?

300 milking Jersey cows

210 milking Holstein cows

300 beef cows (including unweaned calves)

1,800 finishing pigs (60 – 230 lbs)

80,000 sq. ft. of growing area for chicken broilers

45,000 laying hens

decision review, an agricultural operation is assumed to be one farm unit and will be referred to as a farm.

A nutrient unit is a measure of the size of a farm operation based on the amount of manure generated or that could be generated based on the housing capacity of the farm unit, allowing OMAF, MOE and other stakeholders to compare hog farms with poultry farms. One NU is the amount of manure that gives the fertilizer replacement value of the lower of 43 kg of nitrogen or 55 kg of phosphate.

There are four NU thresholds:

- 300 NU or more (e.g., at least 210 milking Holstein dairy cows)
- 150 NU or more but less than 300 NU (e.g., at least 105 but less than 210 milking Holstein dairy cows)
- More than 5 NU but less than 150 NU (e.g., more than 3 but less than 105 milking Holstein dairy cows)
- 5 NU or less (e.g., 3 or fewer milking Holstein dairy cows).

The NU threshold determines which rules in O.Reg. 267/03 will apply. There is no restriction in the *NMA* or O.Reg. 267/03 on the number of animals that a farm can have. Tables 1 and 2 provide a summary of the key requirements that apply to new and expanding farms (Table 1) and existing farms (Table 2). Table 3 lists estimates of how many farms are captured by O.Reg. 267/03 based on livestock type.

Most of the rules are being phased in over five years. O.Reg. 267/03 applies first to new livestock farms and existing livestock farms expanding to 300 NU or more, followed by large sewage treatment plants and then existing agricultural operations of 300 NU or more. A few rules in the regulation apply to all farms regardless of the NU. An implementation date of 2008 has been proposed for other farms but this matter has been referred to the Provincial Nutrient Advisory Committee for further consideration. Municipal by-laws that address the same topics as O.Reg. 267/03 continue to be applicable to farms not under O.Reg. 267/03.

O.Reg. 267/03 consisting of 13 parts includes rules on:

- Nutrient management strategies and plans
- Land application standards
- Outdoor confinement areas
- Siting and construction standards
- Sampling, analysis and quality standards
- Application methodology standards
- Licensing and certification
- Monitoring, compliance and enforcement.

The regulation also makes reference to four protocols – Nutrient Management, Construction and Siting, Sampling and Analysis, and Local Advisory Committee – which provide additional details and are legally enforceable. The rules described below only apply to farms when they become regulated, i.e., when they are phased-in.

Nutrient Management Strategies and Plans

A generator of nutrients, e.g., livestock farm, sewage treatment plant or pulp and paper mill, is required to prepare a nutrient management strategy (NMS) which includes information on the operation, how much nutrient, e.g., manure, is produced, how it will be stored, an analysis of its nutrient content, and where it will be used. The NMS must be updated at least once every five years or whenever there is a significant change.

A livestock farm that applies nutrients to agricultural land is also required to prepare a nutrient management plan (NMP) which includes information about the farm and its fields, an analysis of the nutrients to be applied, how much will be applied and at what rate, and on how the nutrients will be stored. If the farm does not have sufficient land on which to spread all of its nutrients, several options are available: purchase additional land, lease land from a neighbour, or reduce the amount of nutrients received/generated. The latter option may mean that the number of livestock must be reduced.

Two versions ("long" and "short") of the NMP and NMS are available reflecting different levels of environmental risk that a farm poses to the environment. A livestock farm that generates or receives liquid manure, land-applies biosolids or pulp and paper sludge, or generates 150 NU or more is required to complete the long version and must have the NMP/NMS approved by OMAF. All other livestock farms may complete the short version which does not require OMAF approval.

Land Application Standards

Based on the type of nutrient being applied, the regulation defines land application standards such as setbacks, land conditions, application methods and rates. The objective is to reduce the risk of nutrients entering surface or ground water, wells or that nutrients will be over-applied. For instance, nutrients must not be applied within 100 metres (328 feet) of a municipal well. Land application of nutrients to organic soils is exempt from the setback standards since organic soils absorb nutrients very rapidly which reduces the potential for runoff. Liquid nutrients can be applied within 150 metres of surface water if the soil can absorb the liquid without running off. In its NMP, a farm must identify any wells and surface water on its property or nearby, and indicate the setbacks that will be used.

The regulation also includes standards for applying nutrients to land that is frozen or snow-covered since these conditions increase the risk of runoff. Nutrients, with the exception of biosolids, can be applied between December 1st and March 31st if the ground is not frozen or snow-covered, and only if other conditions are met as well. Manure can be applied at any time even if the ground is frozen or snow-covered provided various conditions are met.

Outdoor Confinement Areas

Outdoor confinement areas (OCAs) are defined as housing systems where the animals are kept outdoors and when more than half of the feed requirements of the animals is supplied rather than provided by grazing. Runoff contaminated with manure from OCAs is of concern since it could reach surface or ground water. OCAs are classified based on the number of days the animals are housed in the OCA and on the number of NU per hectare per year generated by the livestock housed in the OCA. The regulation includes minimum soil characteristics for OCAs, manure handling requirements, and setbacks from wells and drainage tiles. Snow contaminated with manure is treated as a nutrient requiring appropriate storage and disposal practices which may include land application.

Siting and Construction Standards

The regulation includes standards related to the siting and construction of new and expanding barns that contain manure storages. Siting standards include setbacks from wells and surface water. A site characterization study is required for farms proposing liquid manure systems, and for operations of greater than 300 NU proposing solid manure systems without a concrete floor. The results of the study will determine the suitability of the site for the type of storage that is being proposed.

The construction standards include capacity requirements, and standards for construction materials such as concrete, steel and earth, and liners. Standards vary depending on whether the storage system is permanent or temporary, and the type and depth of soil beneath the facility. As a general rule, all livestock operations require sufficient storage capacity for all nutrients generated or received during a 240-day period, although exceptions are allowed.

Sampling, Analysis and Quality of Nutrients

Livestock farms of 300 NU or more are required to analyze the nutrients that they generate at least once every five years for nitrogen, phosphorous, potassium and total solids. A computer software program called NMAN provided by OMAF can be used to determine the rate at which nutrients should be applied. Biosolids must be sampled and analyzed to ensure that they meet the standards for 11 metals and pathogen (e.g., *E. coli*) content.

Application Methodology Standards

The regulation includes standards related to the equipment and procedures used to apply nutrients to land to reduce the potential for runoff, inconsistent application rates and spills. Of particular concern are high-trajectory application systems, i.e., spray guns, since they do not apply nutrients at a consistent rate and they may contribute to odour concerns. As a result, the use of high-trajectory applications systems by any farm for non-agricultural source nutrients was banned effective September 30, 2003, to be followed by a ban for manure effective March 31, 2005, or on the date that the farm is required to have a NMP if this date is earlier. High-trajectory application systems will still be allowed for very dilute nutrients. The regulation requires that direct-flow application systems be capable of being shut down within one minute either manually or automatically to reduce the potential of a spill.

Licencing and Certification

The regulation defines five types of certificates and two types of licences. Anyone who prepares a NMP or NMS will be required to have a certificate – the type of certificate depends on whether you are a farmer, consultant, broker, trainer or biosolids generator, and for a farmer the size of farm. Anyone who operates or owns a livestock operation of 150 NU or more and who prepares a NMS or NMP must be certified, and must have the NMS or NMP approved by OMAF. Anyone who owns or manages a business that applies nutrients, and technicians who apply nutrients will be required to obtain a licence. OMAF has outlined course and evaluation requirements for each type of certificate and licence. Most types of certificates and all types of licences must be renewed every five years.

<table>
<tr><th colspan="5">TABLE 1: SELECTED FEATURES OF O.REG. 267/03 APPLYING TO NEW LIVESTOCK FARMS OR LIVESTOCK FARMS EXPANDING TO >= 300 NU</th></tr>
<tr><th>DATE</th><th><= 5 NU</th><th>> 5 NU and < 150 NU</th><th>>= 150 NU and < 300 NU</th><th>>= 300 NU</th></tr>
<tr><td rowspan="6">Sept 30, 2003</td><td colspan="4">Ban on high-trajectory guns for applying non-agricultural source materials.</td></tr>
<tr><td colspan="4">Ban on land application of sewage biosolids between Dec 1 and March 31, and anytime ground is snow-covered or frozen.</td></tr>
<tr><td colspan="4">Non-agricultural source materials must be applied at least 20 metres away from top of nearest bank of surface water.</td></tr>
<tr><td></td><td colspan="3">O.Reg. 267/03, i.e., NMP, NMS required.</td></tr>
<tr><td></td><td></td><td colspan="2">NMP and NMS must be approved by OMAF.</td></tr>
<tr><td></td><td colspan="3">Ban on high-trajectory guns for applying manure.</td></tr>
<tr><td>March 31, 2005</td><td>Ban on high-trajectory guns for applying manure.</td><td colspan="3">Ban was applied to these farms effective Sept. 30, 2003.</td></tr>
<tr><td>Dec 31, 2005</td><td></td><td></td><td colspan="2">Agricultural Operation Planning Certificate required.</td></tr>
<tr><td>Dec 31, 2007</td><td></td><td>Agricultural Operation Simplified Planning Certificate required.</td><td></td><td></td></tr>
</table>

<table>
<tr><th colspan="5">TABLE 2: SELECTED FEATURES OF O.REG. 267/03 APPLYING TO LIVESTOCK FARMS EXISTING AS OF SEPT 30, 2003</th></tr>
<tr><th>DATE</th><th><= 5 NU</th><th>> 5 NU and < 150 NU</th><th>>= 150 NU and < 300 NU</th><th>>= 300 NU</th></tr>
<tr><td rowspan="3">Sept 30, 2003</td><td colspan="4">Ban on high-trajectory guns for applying non-agricultural source materials.</td></tr>
<tr><td colspan="4">Ban on land application of sewage biosolids between Dec 1 and March 31, and anytime ground is snow-covered or frozen.</td></tr>
<tr><td colspan="4">Non-agricultural source materials must be applied at least 20 metres away from top of nearest bank of surface water.</td></tr>
<tr><td>Mar 31, 2005</td><td colspan="4">Ban on high-trajectory guns for applying manure.</td></tr>
<tr><td rowspan="2">Jul 1, 2005</td><td></td><td></td><td></td><td>O.Reg. 267/03, i.e., NMP, NMS required.</td></tr>
<tr><td></td><td></td><td></td><td>NMP and NMS must be approved by OMAF.</td></tr>
<tr><td>Dec 31, 2005</td><td></td><td></td><td></td><td>Agricultural Operation Planning Certificate required.</td></tr>
<tr><td>2008</td><td></td><td colspan="2">OMAF has indicated that these farms may be brought under O.Reg. 267/03, i.e., NMP, NMS required.</td><td></td></tr>
</table>

TABLE 3: ESTIMATES OF THE NUMBER OF REGULATED FARMS BY LIVESTOCK TYPE[1]

LIVESTOCK TYPE	TOTAL NUMBER OF FARMS	MOST RULES IN O.REG. 267/03		
		NEVER APPLY	AFTER JULY 1, 2005	MAY APPLY IN 2008
Dairy cows and heifers	8,361	694	397	7,270
Beef cows, heifers, steers, bulls	23,345	4,333	316	18,696
Swine – growers and finishers	3,968	1,099	225	2,644
Swine – sows and gilts for breeding	2,802	813	83	1,906
Sheep including lambs	3,874	2,613	0	1,261
Poultry – layers	6,427	5,922	38	467
Turkeys	1,159	1,011	32	116

[1] These numbers were derived from data provided by OMAF and are based on Statistics Canada Census 2001 data. Since Statistics Canada may not be using exactly the same definition for NU as OMAF, the above table is provided for illustrative purposes only and should not be used if more accurate data is required.

Monitoring, Compliance and Enforcement

When O.Reg. 267/03 was finalized in July 2003, it was envisaged that OMAF would be responsible for monitoring and complaint handling. MOE would only be involved and would prosecute if warranted if there was a spill or an incident that could have a major impact on human health or the environment. However, on November 26, 2003, OMAF and MOE jointly announced that MOE would be overseeing all monitoring, compliance and enforcement activities related to the *NMA*. In the press release, they noted that this decision fulfills one of the recommendations of the Walkerton Inquiry. OMAF staff responsible for monitoring and compliance have since been transferred to MOE, which should ensure that MOE has the agricultural knowledge in its field staff.

Implications of the Decision

Implementation of O.Reg. 267/03 will affect numerous stakeholders in rural Ontario – farmers, residents and municipalities. In addition, municipalities that generate biosolids and pulp and paper operations are also affected. O.Reg. 267/03 has a number of environmental implications.

Impact on the Environment

This regulation and associated protocols include numerous rules that are intended to protect the land, and surface and groundwater from becoming contaminated due to inappropriate nutrient management practices. Currently the regulation applies to about 1,100 farms which, according to OMAF, represent at least one quarter of the manure produced on Ontario livestock farms. As a result, significant environmental improvements are not expected in the near-term. Long-term improvements will depend on whether the government decides to bring other farms under the regulation.

Rules related to siting of farm structures such as setbacks and depth to bedrock, and construction standards for farm buildings, manure storage facilities, and outdoor confinement areas are intended to minimize the risk of nearby wells and water bodies from being contaminated by nutrient runoff. Rules related to sampling and analysis of nutrients, and to application methodologies are intended to minimize the risk that nutrients will be over-applied to soil. In addition, rules related to application methodologies reduce the risk of a major spill occurring or that nutrients will be unintentionally applied to an inappropriate area, e.g., a stream. These rules also prohibit the application of biosolids if they exceed certain metal and pathogen concentrations reducing the likelihood that toxic levels will be reached in the soil or that pathogens such as *E. coli* enter the food chain or drinking water.

Impact on Farmers

One of the original objectives of enacting nutrient management legislation was to provide consistent, province-wide rules so that farmers would not be subject to different rules in each municipality. Although O.Reg. 267/03 has the potential to fulfil that objective, consistency has not been achieved. Since only large livestock operations, numbering about 1,100 in Ontario (Statistics Canada Census 2001), and new livestock operations or operations expanding to 300 NU or more are covered by the regulation, the majority of the farms in Ontario remain subject to municipal by-laws until at least 2008. As of May 2003, there were about 85 municipal nutrient management by-laws in place. The Provincial Nutrient Management Advisory Committee has been asked to make recommendations to OMAF on whether all farms should be brought under O.Reg. 267/03 and, if so, when.

Farms subject to O.Reg. 267/03 have additional paperwork and record keeping requirements to meet. NMSs/NMPs for large farms can be 100 pages long. In addition, soil and nutrient testing by accredited laboratories is required in some instances and may be a challenge to arrange in some parts of the province. Due to soil type, depth to bedrock, setbacks and existing nutrient load, some farmers may now not be able to apply nutrients on land previously used for that purpose. In addition, some farmers may be required to construct/upgrade their facilities/equipment. The ban on the use of high-trajectory application systems will also affect some farms.

Impact on Municipalities

Since September 30, 2003, municipalities must ensure that applications for building permits for farm buildings comply with the regulation. In the past, municipalities could draft by-laws that addressed agricultural issues specific to their area. Now, by-laws can only be applied to farms not under O.Reg. 267/03 and municipalities are being encouraged by OMAF to ensure that by-laws are consistent with O.Reg. 267/03. In addition, municipalities that land-apply their biosolids will be required to submit NMSs to OMAF for approval.

Impact on the Public

As noted above, some farms are subject to the rules under O.Reg. 267/03, others to municipal by-laws and the remainder are not subject to either. As a result, it is difficult for the public to know what rules are being applied and by whom. In addition, one of the most common causes of complaints from the public, odour, has been referred to the Provincial Nutrient Management Advisory Committee for further consideration.

Public Participation & *EBR* Process

Consultation on the draft regulation began in August 2002 with the release of the Stage 1 proposal (RC02E0001). Almost 600 people attended five public meetings and about 80 written submissions were received through the Environmental Registry and other avenues. The draft regulation was subsequently revised and expanded to include numerous other topics and was re-released in December 2002 as Stage 2 (RC02E0002) for further discussion. In total, OMAF received more than 550 written submissions and staff heard 190 presentations at 15 public meetings on the Stage 2 proposal. On March 21, 2003, OMAF announced that significant changes were being made to the draft regulation such as applying the regulation to only new and expanding large livestock farms instead of all farms, and establishing a provincial advisory committee to provide recommendations regarding a number of issues. The final version of the regulation was filed as O.Reg. 267/03 on June 30, 2003.

Comments were received from farm groups, environmental groups, municipalities, and agribusinesses. Concerns raised by farm groups included the cost of implementing these regulations and availability of financial assistance, complexity of the regulations, and technical issues such as the minimum depth to bedrock, and winter spreading of nutrients. Environmental groups emphasized the need to set rules for large farms, the need to protect the environment, and suggested that farms should be treated like any other industry. Municipalities expressed concern about potential conflicts between the Stage 2 proposal and the *Planning Act* regarding zoning and setbacks, and the impact on the building permit process.

On December 19, 2003, O.Reg. 267/03 was amended by O.Reg. 447/03. For more information regarding this notice, see page 27 of this Supplement.

SEV

In a briefing note to the ECO, OMAF indicated that the *NMA* and O.Reg. 267/03 are consistent with its SEV since they "were developed in order to provide clear, consistent standards for agricultural practices with an overall intention of minimizing the effects of agricultural practices on the environment, especially as they relate to land-applied materials containing nutrients." OMAF notes that this is consistent with the purpose of the *EBR* to "protect the environment, provide sustainability of the environment, and to protect the right to a healthful environment….the prevention, reduction, and elimination of materials that could potentially threaten the integrity of the environment."

Other Information

In June 2003, OMAF established the Provincial Nutrient Management Advisory Committee which has 24 members including representatives from farm organizations, the crop industry, livestock industry, agribusiness, rural municipalities, environmental organizations and the scientific and academic community. The Committee has been asked to make recommendations regarding technical issues that have arisen including: the implementation schedule for farms not currently covered by the regulation; the siting, construction and decommissioning of nutrient storage facilities; manure application near municipal wells and on tile-drained land; and odour-related setbacks.

Over the last few years, concerns regarding the impacts of intensive farm operations, particularly hog farms, on water quality and rural communities have become more common. The City of Ottawa has been involved in a lengthy and costly dispute regarding an application for a hog farm building permit in the eastern part of the city. Due to public concern upon hearing of the approval, the city appealed its decision and was partially successful. The court allowed the building permit but reduced the number of hogs allowed from 1,045 to 750. The dispute has cost the city almost a million dollars to-date and may increase since some issues remain outstanding. Under the *NMA*, municipalities cannot limit the number of livestock. In addition, the city has been told by the Ministry of Municipal Affairs and Housing to remove the requirement for a three kilometre buffer between a hog farm and residential areas, institutions, etc., from its Official Plan. The city is appealing to the Ontario Municipal Board.

O.Reg. 447/03 which amended O.Reg. 267/03 included numerous changes, some of which are highlighted in the following table.

Table 4: Summary of some key amendments to O.Reg. 267/03 by O.Reg. 447/03.

Section of O.Reg. 267/03 amended by O.Reg. 447/03	Description of the change
Section 1. Definitions.	Several definitions were added including: Approved design capacity (in relation to sewage treatment plants), pulp and paper biosolids, and pulp and paper sludge. Several definitions were also reworded but retained their original intent.
Section 11.1 Construction of buildings or structures.	New rule. If a farm requires a NMS, construction cannot begin on a structure to house animals or store nutrients unless the NMS has been prepared and approved according to the regulation.
Section 27. Requirement for approval of NMSs.	Revision. A NMS for a farm capable of generating 150 NU requires OMAF approval.
Section 31. Amendment, suspension and revocation of approval of NMPs or NMSs.	New. The Director is given authority to amend, suspend or revoke an approval of a NMP or NMS at any time if certain conditions are met.
Section 35. Requirements for brokers to accept/transfer nutrients.	Revision. The exemption which permitted brokers to accept/transfer biosolids without ensuring that a regulated farm had a NMP or NMS was deleted.
Section 44. Requirement for vegetated buffer zone.	New. The rule prohibiting the application of nutrients to vegetated buffers was revised to allow commercial fertilizers.
Section 54. Outdoor confinement areas. Requirements for load-bearing surface.	Revision. Additional options were added for low-density outdoor confinement areas.
Section 69.1 Construction or expansion of buildings.	New. Construction or expansion is not allowed unless the farm also ensures that adequate nutrient storage facilities are available.
Section 85. Temporary Field Nutrient Storage Sites. Length of storage.	Revision. The fixed maximum length of storage for prescribed materials other than de-watered biosolids has been replaced with a calculation that takes into consideration site characteristics.
Sections 97 and 98. Non-agricultural Source Material. Prohibitions on application to land and on transfer.	Revision. Land-application of non-agricultural source materials from a regulated farm to golf courses and to land on which tobacco is grown is prohibited at any time, and to any land is prohibited if quality standards are not met. Transfer is also prohibited if quality standards are not met.
Section 98. Table of sampling frequencies for non-agricultural source materials.	Revision. The minimum sampling frequency was revised from "no less than n days" to "within n days" and the unit of measure was clarified to be "dry weight." Note: "n" days are defined in the regulation.
Sections 99 and 106. Prescribed nutrient management practices and broker certification.	Revision. Clarified that training and certification rules only apply to brokers that receive or transfer nutrients from/to farms which are required to have a NMS/NMP.
Sections 107 and 108. Prescribed materials application business licence and nutrient application technician licence.	Revision. Clarified that these licences are only required for businesses and technicians that do business with farms which are required to have a NMP.
Note: Numerous changes were also made to three of the protocols. The revised protocols can be obtained from the OMAF Web site.	

Walkerton Recommendation

In Part Two of the Report of the Walkerton Inquiry, Justice O'Connor noted the lack of regulations in Ontario protecting drinking water sources "from the potential impacts of agriculture." As an example, he cited the lack of legislation regarding manure storage and management, and the lack of an inspection program. Justice O'Connor stated that his "main recommendation is that every large or intensive farm, and every smaller farm located in an area designated as sensitive or high-risk, be required to develop a water protection plan that is consistent with the local watershed-based source protection plan (once the latter becomes available) and is binding on the farm's activities."

Other Jurisdictions

In 2003, the Quebec government extended its moratorium on hog farm expansions for at least another year to provide additional time to address social, economic and ecological issues regarding pork production in the province. In recent years, Quebec has seen significant growth in the number of intensive hog farms, in part due to farmers moving their operations from Europe to escape strict environmental legislation. As a result, the Quebec government initiated an extensive public consultation regarding pork production and asked for recommendations. They concluded that "lifting the moratorium … would be socially perilous, until concrete actions are taken." Of the 58 recommendations, they noted two that should receive immediate attention:

- "Recommendation 13: The Commission recommends implementing a social and environmental impact analysis process involving public participation for all proposed hog operations requiring a certificate of authorization issued by the Minister of the Environment."
- "Recommendation 15: The Commission recommends that exemption from legal liability in an action brought against third parties as regards dust, noise or odours resulting from certain agricultural activities be limited to normal agricultural practices."

The Commission also recommended that a simplified version of fertilization plans and information regarding certificates of authorization proposals for pork production projects be made available to the public; that the Ministry of the Environment exert tighter control over spreading activities; and that agricultural activities be managed at the watershed level. These recommendations are very similar to those made in 1997 by the National Environmental Dialogue on Pork Production in the U.S. This forum proposed that the public have full participation and access to documents as part of the approval process of all new or expanded pork operations; all operations have a nutrient utilization plan; and regulations should be enforced stringently.

ECO Comment

There are many potential sources of contaminants that degrade water quality – industry, sewage treatment plants, and septic systems are commonly identified, and although there is considerable room for improvement, these sources have been subject to legally enforceable rules for years. However, agriculture has also long been recognized as a potential source of contamination. Nutrients, such as manure, agricultural runoff and biosolids, are known to contain, not just nitrogen and phosphorus, but also pathogens, such as *E. coli*. In addition, biosolids may contain metals that also can degrade our soil and water. The *NMA* is intended to manage nutrients in a way that protects the natural environment. However, standards for metals only apply to non-agricultural source materials and for pathogens to biosolids.

At a lengthy 250 pages plus, O.Reg. 267/03 and its four protocols are quite complex and prescriptive, and are a challenge for the average person to read and understand. The ECO acknowledges the fact that OMAF has created numerous plain language documents and is in the process of implementing training programs for stakeholders. However, further rules and added complexity seem inevitable because OMAF has referred a number of topics to the Provincial Advisory Committee for further consideration, and these should also be incorporated into training programs and plain language documents.

In our 2002/2003 annual report, the ECO noted that key aspects of the multi-barrier approach to water quality protection recommended by Justice O'Connor in the Report on the Walkerton Inquiry have yet to be developed by the Ontario government, including watershed-level protection of drinking water sources. This remains the case, and superimposing nutrient management plans onto watershed-based source plans will be a technical and political challenge. The Ontario Federation of Agriculture (OFA) has expressed concern and believes it is unfair that farms will be subject to further restrictions when source water protection legislation is introduced. The OFA is also concerned that the Oak Ridges Moraine Conservation Plan is restricting farmers' ability to expand on the moraine. Clearly many issues and questions remain unresolved.

In our 2002/2003 annual report and in correspondence sent to OMAF in 2002 and 2003, the ECO urged OMAF to prescribe the *NMA* under the *EBR*. If it is not, certain *EBR* rights may not be available to the public, including applications for review, investigation or leave to appeal, as well as the right to sue for harm to a public resource. OMAF has yet to make a decision on this point. The ECO also urged OMAF to prescribe NMPs and NMSs for large farms and biosolids as instruments under the *EBR* so that they can be posted on the Registry and be subject to comment by the public. Currently, neither the *NMA* nor O.Reg. 267/03 provide the public, particularly neighbours and municipalities, with the ability to comment on NMSs and NMPs that may affect their community. Neighbours will not be able to verify that wells and waterbodies on their properties are noted appropriately on the farmer's NMP, nor will they be able to perform water quality testing on their wells with a full understanding of the potential impact to their wells. The ECO notes that other jurisdictions, including Quebec in 2003 and the U.S. in 1997, have stressed the importance of making such information available to the public and of involving the public in the approval decisions. Since the *EBR* was implemented in 1994, the public has had the opportunity to review and comment on other decisions, such as permits-to-take-water and certificates of approval that affect the environment and to raise important environmental considerations that may have not been apparent to the government or the proponent. It is not too late for Ontario to consider the benefits of increased transparency. Furthermore, an application for review gives the agricultural community and the public the right to ask the government to consider modifications to existing legislation or to request new legislation. An application for investigation gives the public, including farmers, the right to request the government to investigate possible violations of the *NMA* or O.Reg. 267/03.

In the near and mid-term this regulation does little to reduce degradation of water quality in the province due to mismanagement of nutrients. Although the ban on the use of high-trajectory guns for spreading of biosolids and manure applies to all farms and should reduce the likelihood of nutrients entering surface water, the bulk of the legislation will not apply to most farms in

Ontario until at least 2008. As a result, the people and environment of Ontario will not fully benefit from this legislation for many years unless municipalities enact nutrient management by-laws applicable to the other farms.

Regardless, O.Reg. 267/03 is a major step forward in nutrient management – it provides a comprehensive set of rules for managing nutrients that the ECO believes must be phased-in over time. In addition, it has served as a vehicle for a public discussion of agricultural practices in Ontario today and it puts farmers that are currently not covered by the regulation on notice of what may be expected of them in the future. However, the ECO is of the opinion that it will do little to allay the concerns of the public and that the tension that exists in some rural areas will continue.

MINISTRY OF ENERGY

Review of Posted Decision:
Prescribing Regulation-making Authorities in the *Ontario Energy Board Act* under the *EBR*

Decision Information:

Registry Number: RO01E1001	Comment Period: 90 days
Proposal Posted: April 25, 2001	Number of Comments: 0
Decision Posted: April 16, 2003	Came into Force: March 28, 2003

Description

In March 2003, the Ministry of the Environment (MOE), working with the Ministry of Energy (ENG) made O.Reg. 104/03 to amend O.Reg. 73/94, the general regulation under the *Environmental Bill of Rights* (*EBR*). The main purpose of this amendment was to make certain regulation-making authorities in the *Ontario Energy Board Act* (*OEBA*), related to environmental labelling, tracking, emission credits and emission standards, subject to specific provisions of the *EBR*.

O.Reg. 104/03 prescribed regulations made under the authority of clauses 88(1)(a.1) through (g) of the *OEBA* for the purposes of the *EBR*. According to the Environmental Registry notice, clauses 88(1)(b)-(g) provide Cabinet with the authority required for O.Reg. 416/99, which prescribed the rules for the first phase of the Environmental Labelling Program for electricity retailing.

Clauses 88(1)(b)&(c) permit regulations requiring electricity retailers and generators to make a timely disclosure to MOE or the Independent Electricity Market Operator (IMO) of the nature and quantity of prescribed contaminants emitted by the generation facility where the electricity is produced, the nature of the fuel and the process of generation used at the facility. Clauses 88(1)(f)&(g) provide for similar regulations concerning the disclosure of this information to consumers. ENG expects that clauses 88(1)(b), (c), (f) & (g) will eventually become redundant once a tracking system has been developed, and they will be repealed at that time.

Clause 88(1)(d) provides for regulations requiring retailers or generators to file with the Ontario Energy Board evidence that the generation facility from which the electricity is produced meets emissions standards set out under the *Environmental Protection Act* (*EPA*). Clause 88(1)(e) allows for regulation of how reductions, credits or allowances acquired by a retailer or generator under the *EPA* may be used to determine whether there has been compliance with emissions standards.

Clause 88(1)(a.1) of the *OEBA* gives Cabinet the authority to make regulations to establish and operate a tracking system to associate electricity with the processes and fuel types used by generation facilities, and with the types and quantities of contaminants emitted by generation facilities.

The amendment to O.Reg. 73/94 means that regulations made under the authority of clauses 88(1)(a.1) through (g) must be posted on the Registry for review and a minimum 30-day comment period. Such regulations are also now subject to applications for review under Part IV, and to the whistleblower provisions in Part VII of the *EBR*.

Implications of the Decision

ENG indicated in the Registry notice for this regulation that both the environmental labelling program and the tracking system were environmentally significant because they relate to the renewable energy market in Ontario. Increased reliance on electricity generated from renewable energy sources will reduce the negative environmental impacts from coal-fired electricity generation, such as air pollution and climate change.

Public Participation & *EBR* Process

This regulation was first posted in April 2001 with a comment period of 60 days. At that time, ENG proposed to prescribe clauses 88(1)(b)-(g) under the *EBR*. The proposal was reposted in June 2002 because ENG revised it to include clause 88(1)(a.1), an amendment proposed to the *OEBA* in Bill 58, the *Reliable Energy and Consumer Protection Act*. The legislature passed Bill 58 in June 2002 and clause 88(1)(a.1) is now in force. The reposted proposal notice received an additional 30-day comment period.

No comments were received on this proposed regulation during the two Registry comment periods.

SEV

No documentation concerning SEV analysis was received by the ECO from ENG.

Other Information

MOE also used O.Reg. 104/03 to make two administrative amendments to O.Reg. 73/94 under the *EBR*. MOE revoked s. 15.1 of O.Reg. 73/94, which exempted field orders from the notice and comment provisions of the *EBR*. Field orders have now been replaced by Provincial Officer's Orders, which are not prescribed MOE instruments in O.Reg. 681/94 under the *EBR*, so this exemption was no longer needed. Also, MOE revoked s. 15.4, which provided an exemption from posting requirements for certain activities that occurred between November 29, 1995 and September 30, 1996, because the time period for this exemption had passed.

ECO Comment

The ECO first identified the need to prescribe these regulation-making powers in our 1998 annual report (see pages 142-145). The ECO commends ENG for prescribing these regulation-making authorities under the *OEBA* for the purposes of the *EBR*. Given other recent amendments to the *OEBA* related to energy conservation, ENG should consider prescribing other *OEBA* provisions under the *EBR*. (See pages 104-106 of the annual report for analysis of Bill 4.)

It was appropriate that ENG included the additional regulation-making provision introduced in Bill 58, and provided a second comment period in relation to it.

Review of Posted Decision:
Ontario Energy Board Amendment Act, 2003 (Electricity Pricing)

Decision Information:

Registry Number: AO03E0001	Comment Period: 31 days
Proposal Posted: December 3, 2003	Number of Comments: 1
Decision Posted: April 5, 2004	Came into Force: April 1, 2004 (by partial Proclamation)

Description

The *Ontario Energy Board Amendment Act, 2003* (Electricity Pricing) or Bill 4, led to several significant changes to Ontario's electricity system. The Bill set the stage for a new pricing scheme for electricity for certain consumers in Ontario. Bill 4 did this by amending the *Ontario Energy Board Act, 1998* (*OEBA*) to repeal the provisions of the *OEBA* which had set the price at 4.3 cents per kilowatt-hour until May 1, 2006. In its place, Bill 4 added a provision to the *OEBA* to enable the Minister of Energy to set, by regulation, the commodity price for electricity paid by low-volume consumers and designated consumers. O.Reg. 42/04 set the new price at 4.7 cents per kilowatt-hour for the first 750 kilowatt-hours consumed each month (approximately the amount of electricity that would be consumed by a small household). Consumption beyond 750 kilowatt-hours each month would be priced at 5.5 cents per kilowatt-hour. This new price structure started on April 1, 2004, but was established only as an interim price scheme. Affected consumers will begin to pay a commodity price for electricity set by the Ontario Energy Board (OEB) as of May 1, 2005 (or earlier if prescribed by regulation), under provisions of Bill 4.

The Bill 4 amendments also simplified the process for applying for a change in the rates charged for the distribution of electricity. Section 79.6 of the *OEBA* was amended so that electricity transmitters no longer need Minister of Energy approval of an application to the OEB for an electricity transmission rate change.

Bill 4 also amended section 78 of the *OEBA* to require the OEB to approve or fix separate electricity rates for different situations prescribed by regulation. These situations would include specifying rates according to amount of electricity used and time when it is used.

The legislation was written with many enabling provisions. Enabling provisions require or permit a regulation to be made to articulate the details and use of the legislative authority created by the provisions. The table below shows the number of regulations which were made in early 2004 under the *OEBA*. The Bill 4 legislation was also written with provisions which take effect in the future, in some cases after new regulations are passed by the Ministry of Energy (ENG). For example, having the OEB develop a price-setting mechanism, and setting the price of electricity according to time and amount of electricity used both require the creation of regulations. Also, Bill 4 frequently specifies that provisions will take effect by a certain date "or such earlier date as is prescribed by the regulations." April 1, 2004 was designated the day on which many of the key Bill 4 amendments came into force.

Regulation	Title
O.Reg. 3/04	Electricity Pricing
O.Reg. 4/04	Payments Re: Section 79.4 of the Act
O.Reg. 41/04	Definitions and Exemptions
O.Reg. 42/04	Commodity Price for Electricity: Low-Volume Consumers and Designated Consumers
O.Reg. 43/04	Payments Re: Section 79.4 of the Act

The way Bill 4 was written, i.e., with many enabling provisions, requiring regulations to be written, and with dates to be specified in the future, makes it difficult for stakeholders to determine the exact nature of this legislative initiative. It can also make it difficult for the public to comment in a meaningful way on this type of legislation. And, the public and stakeholders may not get an opportunity to comment on the regulations because the *OEBA* is not fully prescribed for the purposes of the *EBR*.

Detailed Description

Bill 4 amended *OEBA* section 79.4 which deals with the commodity price for electricity payable by low-volume consumers and designated consumers. The Bill gives Cabinet the authority to determine through regulation the price of electricity used before May 1, 2005 (or earlier as prescribed by regulation). Section 79.4, prior to Bill 4, provided for a price of 4.3 cents per kilowatt-hour, or lower, if Cabinet chose to make a regulation. Section 79.4 was also amended to enable the OEB to determine the price of electricity used by low-volume consumers and designated consumers on or after May 1, 2005 (or earlier date prescribed by regulation) in accordance with regulations.

Section 78 of the *OEBA* was amended by Bill 4 to require the Ontario Energy Board to approve or fix separate electricity rates for different situations prescribed by regulation. Situations could include the amount of electricity used or the time that it is used. This was a key amendment needed for the eventual implementation of conservation measures that ENG described as being part of the Bill 4 initiative. Further, section 78 was amended to require the OEB to comply with regulations governing the approving or fixing of rates for the retailing of electricity in order to meet a distributor's default supply obligations under section 29 of the *Electricity Act, 1998*. It is important to note that because of the way Bill 4 is worded, it is the regulations which provide most of the important details about these provisions.

Bill 4 amended the provisions of *OEBA* section 79.6 which deal with transmission of electricity. Prior to Bill 4, section 79.6 required the approval of the Minister of Energy for an application to the OEB to approve or fix new rates for transmitting electricity, distributing electricity or retailing electricity to meet a distributor's default supply obligations under section 29 of the *Electricity Act, 1998*. Bill 4 amended this section so that the approval requirement no longer applies to rates for transmitting electricity. Corresponding changes were made to sections 79.7, 79.8 and 79.9, which deal with the OEB's power to review its rate orders, the minister's power to require amendments to rate orders and the minister's power to require reviews of rate orders.

The Minister of Energy announced that payments to reimburse consumers would occur if the market price for electricity is lower than that set by the interim pricing scheme established for the period up until the OEB sets up a pricing scheme for May 1, 2005. To provide for this, section 88.0.1 of the Act was amended to permit the making of regulations requiring distributors, retailers or the Independent Electricity Market Operator (IMO) to make payments to certain low-volume consumers and designated consumers. Payments would be made if the Minister of Finance determines that, for the period in which the commodity price for electricity was determined by the Cabinet, the amount received by the Ontario Electricity Financial Corporation under the *OEBA* exceeds the amount expended by the Corporation in connection with the Act. Regulations may also be made to compensate distributors, retailers and the IMO for making any payments required under these amendments.

This legislation received Royal Assent in December 2003 but many of its amendments were not put into effect until April 1, 2004. As such many of these amendments included provisions which allowed them to be enabled by proclamation sometime after December 2003.

Implications of the Decision

Residential and low-volume consumers will begin to pay more for the electricity they consume because of Bill 4, unless they make changes to their electricity consumption habits. This is significant for two reasons. One is that the cost of generating electricity overall in Ontario was greater than what consumers had been paying for it. The net result was a growing financial shortfall, $800 million (up to November 1, 2003) according to ENG – this situation should begin to be rectified with the new pricing structure introduced by Bill 4. Secondly, a rise in the price of a commodity usually draws consumers' attention to that commodity, which may lead to consumers taking actions to buffer the price increase. Consumer actions could include adopting conservation measures to reduce the quantity of electricity consumed. If widespread, conservation measures could buffer the effect of the price increase, reduce the amount of electricity consumed in the province, and consequently reduce by some measure the environmental impacts from electricity consumption.

Another significant development, announced as part of the Bill 4 initiative, is the plan to allow local distributing companies (LDCs) to achieve their full commercial return on the condition that they spend the equivalent of one year of these monies on conservation and demand management measures. This statement was made in ENG's media backgrounder at the time of the legislation. If and when realized, it would bring about a one-time expenditure on conservation. The estimated amount that LDCs could spend is $225 million – an amount, to put into perspective, comparable to the operating budget of the Ministry of Environment which has approximately 1,700 staff. The full effect of this conservation initiative depends on local distributing companies under the watch of the OEB.

Public Participation & *EBR* Process

The ministry's performance regarding public participation in this decision-making process was substandard. The ECO had to request that ENG post an *EBR* proposal for this legislation. The proposal for Bill 4 was posted on the Environmental Registry on December 3, 2003. The public was given 30 days to comment on the proposal. The Ontario government continued to quickly push Bill 4 through the Ontario Legislature (ENG posted a note to this effect at the top of the proposal notice, as per a suggestion by ECO in our 2000/2001 annual report). By December 18, 2003, Bill 4 had received Royal Assent meaning that it would be very difficult to incorporate any aspect of public comment into the decision after this point and that the effective *EBR* comment period was realistically nearer to 15 days. Had ENG been prepared with an *EBR* proposal on the day that the legislation was unveiled, the public would have had at least eight more days of comment period. While the ECO understands that there are circumstances where legislative processes and *EBR* processes need to work contemporaneously, ministries should endeavour to structure these processes to allow reasonable time for commenting, and for comment consideration.

Ministries should also avoid repeatedly posting proposals with constrained comment periods (ENG's notice for Bill 210 in 2002 was similarly constrained; see ECO annual report 2002/2003 for further details) as it will undermine the public's ability to get involved in this key decision-making area. ENG should make every effort to compensate for the inadequate comment periods of Bill 210 and Bill 4 by engaging the public in initiatives related to, and subsequent to Bill 4, as well as plan for more reasonable timeframes for other initiatives. The situation is exacerbated by the fact that ENG is currently not required to post notices on the Registry for regulations arising from these changes.

Despite the limited comment period, one comment was received from a member of an environmental organization, the Ontario Clean Air Alliance (ENG's decision notice attributed the comments to another ENGO, Pollution Probe). This commenter expressed views on Bill 4 under the categories Utility Shareholder Incentives, Consumer-Side of Meter, and Hydro One's Direct Customers. The commenter supported the proposals to raise the electricity price cap and to provide a means for distribution companies (i.e., utilities) to finance energy conservation programs.

Utility Shareholder Incentives.
The commenter felt that the approximately $225 million for energy conservation programs is a substantial sum of money. Comparing this to energy conservation programs in the natural gas industry, (where programs have saved 5.5 to 8.3 times their costs) municipal utilities could be able to reduce their customers' energy costs by up to $1.8 billion or more, according to the commenter. To do so, rule changes by the OEB would be required.

The commenter believes that ENG / OEB needs to establish a mechanism which will allow utilities to recover lost revenues as a result of their energy conservation programs (conservation can financially hurt a utility as its profits are linked to sales of electricity). Also, a mechanism to share the savings from conservation would provide a financial reward to utilities' shareholders for carrying out conservation (e.g., 5 per cent of the savings).

Customer-Side of Meter
Conservation spending (the $225 million arising from regulating utilities) should be directed at the electricity consumption of utility customers and not to improving the efficiency of any given utility's distribution system which can be financed in other ways, according to the commenter.

Hydro One's Direct Customers
According to the commenter, Bill 4 included no provisions to raise the transmission rates of Hydro One to allow it to finance energy conservation programs for its large direct customers (e.g., Inco). The commenter recommended that Hydro One be permitted to levy an energy conservation surcharge on its large direct customers to finance cost-effective energy efficiency programs for them.

In its decision notice, ENG indicated that it received one comment and that the commenter was supportive of the changes. ENG however did not explain the nature of the comments, nor their effect on the decision. Section 36(4) of the *EBR* states that a decision notice "shall include a brief explanation of the effect, if any, of public participation on decision-making on the proposal and any other information that the minister considers appropriate." The ECO believes that the ministry could have presented a more complete representation of the comments. Furthermore, since so many of the powers created by Bill 4 needed to be defined by regulation, ENG could have committed to considering the comments in the regulation-making process.

Important decisions have been made about Ontario's electricity sector in the past four years with limited public consultation. The electricity sector is one with a substantial environmental impact (see ECO annual report 2002/2003 for further details). In proposal processes by MOE on electricity sector regulation (see the Review of O.Reg. 116/01, in ECO's 2001/2002 annual report), many commenters have expressed interest in commenting on the environmental implications of electricity sector policy, and have provided substantial technical information to back up their comments. For these and other reasons, ENG needs to improve the way it engages the public in decisions which are environmentally significant.

SEV
ENG's consideration of its Statement of Environmental Values did not greatly enhance the understanding of ENG's decision-making for this proposal. Most of the text in the SEV consideration was repeated from text in the Act, or summaries of. Two points were added under the values "Environmental Protection" and "Ecosystem Protection," respectively:

- This legislation's two tier pricing structure will encourage electricity conservation, which may aid in the prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.
- This legislation's two tier pricing structure will encourage electricity conservation, which may aid in the protection and conservation of natural resources, including plant life, animal life and ecological systems.

ENG's SEV indicates, among other things, that:

- In making decisions that might have a significant effect on the environment the ministry will provide opportunities for public input.
- The ministry will implement an *Environmental Bill of Rights* awareness program for ministry staff.

ENG should work harder to promote and achieve these goals. The Bill 4 initiative offered ENG a great opportunity to engage the public through the *EBR*.

Other Information

A measure of the interest by the public in the subject matter of Bill 4 was a survey of opinion conducted by a Toronto-based newspaper. In late November 2003, the newspaper received many comments on the ministry's electricity pricing proposal (that of Bill 4). The Minister of Energy cited responses to the survey and quoted persons from organizations dealing with energy and environmental issues in the legislature on November 26, 2003. The survey results highlight both the interest in electricity matters amongst the public and the need for energy-related initiatives to undergo public consultation. Some of the persons quoted by the minister in the legislature on November 26, 2003 concerning Bill 4 included the directors or the presidents of the Canadian Energy Efficiency Alliance, the Independent Power Producers' Society of Ontario, the Ontario Sustainable Energy Association and Energy Probe.

On April 15, 2004, the Minister of Energy announced multiple, longer terms changes to Ontario's electricity system management and pricing. Some of the proposed changes include a new agency to ensure adequate long-term supplies of electricity, a combination of regulated and competitive electricity generation, and conservation targets set by the Ministry of Energy (for more details, see www.energy.gov.on.ca). ENG assured the ECO that it planned to make this initiative subject to public consultation through the Environmental Registry and other means.

ECO Comment

The ECO welcomes ENG's new direction on electricity pricing which was given legal effect by Bill 4. The pricing scheme begins to reflect something closer to the true cost of generating electricity in Ontario. Environmentalists and economists generally agree that the price of electricity, for many consumers in Ontario, has been under-priced and that this pattern has undermined the full potential of any conservation programs. The way in which ENG structured the roll-out of the price change is sensible, providing consumers time to adjust to the onset of new rates, and possibly adopt electricity conserving devices and behaviour. Measures in Bill 4 when fully implemented will help to focus attention on the need for conservation, on shifting consumption to off-peak hours and on the means of using electricity more prudently. Such measures are needed to limit the ongoing environmental impact of the electricity generation which includes smog and acid gas emissions, the creation of radioactive waste, waterway alteration as well as land use and visual impacts.

It should be noted that many of the aspects of ENG's new electricity pricing system will take time to appear. For example, the Ontario Energy Board will not begin to set prices for residential and other low-volume consumers until May 1, 2005.

The ECO welcomes the proposed mechanism by which local distribution companies (LDCs) would carry out conservation initiatives. However, the potential magnitude of this undertaking ($225 million) is significant in terms of current expenditures on conservation. ENG should ensure that there is proper oversight of, and guidance to LDCs so that these funds are spent effectively to reduce electricity consumption.

ENG should have done a better job of consulting the public on this legislation. Bill 4 moved rapidly through the legislature, receiving Royal Assent almost two weeks before the comment period on this proposal was concluded. Though ENG notified the public of this likelihood, the ministry should do a better job of planning to incorporate public input into its decision-making. Comments were received on this proposal yet ENG did not explain the effect of the comments, if any, in the decision notice, noting only that the commenter was in support of the proposed amendments. Even if ENG did not have time to thoroughly consider the comments in the development of the Bill, ENG could have committed to considering the comments in the development of regulations flowing from Bill 4. Moreover, ENG should have provided a better summary of the comments.

The ECO notes that 12 months before this proposal was posted on the Registry, the ECO recommended to ENG that the "Ministry of Energy…consult with the public and take full advantage of the Environmental Registry in developing key environmental aspects of current and forthcoming energy conservation initiatives…" This legislation promotes conservation and demand management initiatives as ENG noted in the proposal posting. Further, when the Bill received Royal Assent, ENG announced that it would provide a "clear and powerful message about energy conservation" in a media release. The ECO finds it unfortunate that ENG has been reluctant to consult the public in the manner required by Ontario's *Environmental Bill of Rights*. Also, ENG should review the *OEBA* for the purposes of prescribing additional sections under the *EBR*, so that all conservation-related regulations are subject to public consultation on the Registry.

MINISTRY OF THE ENVIRONMENT

Review of Posted Decision: Framework for Ontario's Cooperative Agreements and Pilot Project with the Automotive Parts Manufacturers' Association

Decision Information:

Registry Number: PA02E0004	Comment Period: 90 days
Proposal Posted: April 2, 2002	Number of Comments: 4
Decision Posted: March 25, 2003	Decision Implemented: March 2003

Description

Framework for Ontario's Cooperative Agreements

In March 2003, the Ministry of the Environment (MOE) implemented a *Framework for Ontario's Cooperative Agreements* (the Framework) to encourage the reduction of industries' contaminant emissions beyond legal requirements. MOE is gearing this program towards leading industrial facilities that are willing to enter into pilot projects. Cooperative agreements are one of several tools to help MOE achieve its environmental objectives. Other tools include inspections, enforcement, compliance assistance, and economic instruments.

To motivate improved environmental performance, MOE plans to provide participating facilities with incentives such as:

- Technical assistance by ministry staff (expert advice on subjects related to the cooperative agreements and facilities' targeted emission reductions)
- Timely approvals (decisions on facilities' operating permit amendments in 45 days or less)
- More flexible operating conditions (ability for facilities to make process changes and production increases without seeking a revised operating permit)
- Public acknowledgement (MOE recognition in the ministry's communication material)
- Opportunities to participate in ministry policy discussions (yearly industry-government round-tables).

MOE has set entry requirements for facilities interested in participating in a pilot project under the Framework. These requirements include:

- A demonstrated record of environmental compliance
- The ongoing use of an environmental management system
- The submission of air emission monitoring data
- A priority emissions reduction plan that sets out the facilities' targets and timeframe for reducing contaminants.

According to MOE, the Framework will "ensure transparency and public accountability" by requiring that the ministry's cooperative agreements with facilities will include: environmental objectives; measurable targets; public involvement and reporting mechanisms; and, performance verification by an independent third party. If facilities willfully breach performance agreements made under the Framework, the province plans to administer consequences such as loss of access to one or more incentives, immediate full-facility inspection, and/or removal from the program. These consequences can be appealed to MOE staff.

Regarding facilities' pollution reduction commitments, MOE's Framework document acknowledges, "credible monitoring and reporting of environmental performance is key to ensuring transparency, monitoring facility progress and evaluating the impact…" Participating facilities must monitor releases of the contaminant substances targeted for reduction, report any incidents to MOE, and submit publicly available annual progress reports. The ministry says it will review the yearly reports to determine whether facilities are meeting their emission reduction targets and will follow up if a facility is lagging behind.

The ministry plans to form a Multi-stakeholder Management Committee that will provide recommendations to MOE regarding: facilities' entry applications; consequences for poor performance (if facilities do not meet emission reduction commitments); and, any requests made by facilities to appeal a loss of access to incentives. MOE intends that Committee membership will include representation from industry; non-government environmental advocacy organizations; other non-government organizations; and, the ministry.

Pilot Project with the Automotive Parts Manufacturers' Association
To implement the Framework, MOE entered into a five-year pilot project agreement with the Automotive Parts Manufacturers' Association (APMA) in September 2003. Interested facilities can apply and, if accepted, will be required to sign an annex to the APMA agreement.

The APMA pilot project contains the elements of the Framework listed above and includes sector-specific provisions such as a "List of Priority Substances and Targets." The List sets out contaminant substances, reduction targets (quantities) and timeframes for achieving the reductions. Some examples of targeted substances include: volatile organic compounds, particulate matter, greenhouse gases, arsenic, nickel, mercury and PCBs. Participating automotive parts facilities would choose a minimum of three substances from the List to include in their pollution reduction plans.

MOE notes that the APMA pilot project does not preclude the Ontario government from developing other legislation, regulations and programs to protect human health and the environment. Moreover, the APMA pilot project does not prevent participating facilities from engaging in other environmental initiatives.

While not referenced in the Framework as an incentive, the APMA pilot project agreement (and the CCPA pilot project described below) notes that MOE will "provide financial contributions to those projects at such time and in such amounts as may be determined during the time of the pilot projects." The details are to be outlined in an annex to either agreement, or in some other written form. Ministry staff have informed the ECO that no funding had been provided as of May 2004.

Additional Pilot Project with the Canadian Chemical Producers' Association
Although not posted on the Environmental Registry for consultation, MOE also entered into a pilot project with the Canadian Chemical Producers' Association (CCPA) in September 2003. The CCPA pilot project contains similar components as the APMA pilot project, with some features tailored to the chemical industry. For example, some differences exist in the "List of

Priority Substances and Targets" for pollution reduction, and the required environmental management system is one used world-wide by the chemical sector.

Implications of the Decision

Environmental Implications

Environmental gains could result from implementation of the Framework if participating facilities are able to reduce emission of contaminants beyond currently regulated and approved standards. The chosen substances would reflect ministry priorities and could make a significant environmental impact on facilities' operations.

The extent of environmental improvements will depend largely on the number of facilities that participate in the pilot projects and each facility's ability to meet its pollution reduction commitments. As of May 2004, no companies had signed on, although two companies had made applications and MOE was reviewing them. Ministry staff advise that they are actively marketing the program to about 50 companies that have a progressive corporate culture and a quantity of emissions to reduce.

As a possible environmental side benefit, the pilot project application process could illuminate areas where a facility needs to improve its overall environmental compliance. A facility must demonstrate a sound environmental track record to enter into a pilot project agreement with the ministry. But, when the facility prepares the emission summary component of the application (see "Air Emission Tracking" below), it could potentially identify a previously unknown environmental problem. In that case, the facility would develop and implement a ministry-approved plan to bring the facility into compliance. Without such a plan, MOE proposed to deny a facility entry into the program.

A potential area for concern involves reduced ministry oversight of participating facilities' compliance with Ontario's environmental laws and regulations. Because facilities would be considered environmental leaders, they would be eligible for a special permit (called an "Enhanced Comprehensive Certificate of Approval" – or C of A) for their ongoing activities. With that special C of A, facilities would only need to submit a summary report about their operations to MOE every two years. And, the operational flexibility provided to the facility would not have an expiry date as long as the facility participated in the pilot project.

Public/Community Involvement Implications

The implications of the cooperative agreement program for various aspects of public involvement will be unclear until facilities begin participating in the pilot projects.

MOE's Framework supports community involvement by noting: "environmental protection and innovative solutions can be significantly advanced through stakeholder communication and involvement." The ministry expects that participating facilities will engage in communication and outreach activities with government departments, the community and other stakeholders, tailored to the size, setting and type of operation. The APMA and CCPA pilot projects require participating facilities to provide two-way communication with interested parties about facilities' plans and progress under the pilot project and about the environmental aspects of the operation. Facilities must also make their annual progress reports publicly available and submit them to the ministry. MOE has indicated that it will place facilities' verification of results on the ministry Web site.

If a facility had one or more traditional operating permits, it would have to seek ministry approval for many process or emission changes. If those changes were environmentally significant, the public would usually have an opportunity to provide input through a notice posted on the Environmental Registry, and then would have rights to seek leave to appeal under section 38 of the *EBR* or commence a judicial review under section 118 of the *EBR*. But, the Enhanced Comprehensive C of A allows participating facilities to make many modifications without seeking ministry approval or consulting the public, as long as emissions leaving the site don't exceed a prescribed total limit. Thus, the pilot projects' Enhanced Comprehensive C of A incentive could reduce public involvement opportunities for a facility's regular operations.

The Framework and pilot project agreement commit MOE to making a decision on an Enhanced Comprehensive C of A in 45 days. While a 45-day turn-around time could work under some circumstances, it may be problematic if the ministry's technical review or public input identifies significant issues.

Financial Implications
MOE believes that Enhanced Comprehensive Cs of A could provide a financial incentive for participating facilities. Because facilities would not need to seek frequent ministry approval for various process changes they would have to pay fewer fees to MOE for reviewing their applications. It is too early to tell whether those potential savings will offset facilities' costs of applying for initial entry into the pilot project and the preparation and distribution of progress reports on the achievement of pollution reduction targets.

The certainty provided by the ministry's guaranteed turn-around time for providing a decision on Enhanced Comprehensive C of A amendments could provide facilities with financial benefit, as procedural delays may be reduced.

Proceeding with the APMA and CCPA pilot projects will cost MOE an indeterminate amount of money. Costs could be incurred through financial assistance that the ministry may provide to assist the APMA and/or CCPA with pilot project implementation and/or through MOE's provision of technical assistance to participating facilities.

Public Participation & *EBR* Process
Framework for Ontario's Cooperative Agreements
All four comments received on the Registry proposal notice came from industry associations. The majority of respondents stated general support for cooperative agreements and/or the recognition of environmental leadership but all had concerns about the proposal itself. Three of the four respondents expressed a concern that MOE's consequences for poor performance under the Framework are too harsh and that incentives to sign on are too weak.

With respect to consequences if facilities break the terms of a pilot project agreement, the ministry revised the Framework to clarify that MOE intends to assist facilities in successfully meeting program requirements. The final version of the Framework indicates that MOE will consider penalties (such as a reduced number of incentives) if a participating facility demonstrates "wilful non-performance" under a pilot project.

Regarding the incentive of more flexible facility operations, MOE revised the Framework to clarify that pilot project facilities' ongoing activities (outside the Framework) would be eligible for an Enhanced Comprehensive C of A that provides operational flexibility. MOE's decision notice also states that the ministry developed incentives in consultation with industry and other stakeholders, and that the benefits offered to participating facilities reflect similar initiatives in other "leading jurisdictions." According to the decision notice, participating facilities will have the opportunity to work with MOE on the development of additional incentives.

In the draft Framework, MOE had proposed the use of a pilot project identifier as an incentive. Participating facilities were to have the identifier for use in their promotional materials. However, the decision notice said that MOE would work on offering this incentive in the future. Ministry staff have advised the ECO that they continue to seek internal approval for implementing this concept.

Three of the four respondents urged MOE to address harmonization between federal and provincial voluntary initiatives with industry.

The ministry agreed in its decision notice that there are benefits to seeking clarity among voluntary initiatives, and stated that MOE would work with the federal government and other stakeholders to align the ministry's products. However, MOE staff subsequently advised the ECO that alignment with federal initiatives has not progressed at this time. MOE cannot forge a link between the Framework and Environment Canada's ARET (Accelerated Reduction/Elimination of Toxics) program because ARET has ceased to operate. And, despite comparable principles between the Framework and Environment Canada's Environmental Performance Agreements policy, there may be differences in practice. More thought would be required before considering the possibility of links between the Framework and Environmental Performance Agreements. The ECO notes that the APMA participates in the Environmental Performance Agreements program.

Two of the respondents expressed concern about the prescriptive and "cumbersome" nature of the program. However, the ministry believes that the program balances rigour with flexibility. MOE cites facilities' use of performance-based targets; monitoring and reporting; and, third party verification of results as examples of the Framework's rigour. The ministry notes that facilities' choice of pollution reduction targets and how to achieve them, and choice of stakeholder outreach methods demonstrate the program's flexibility.

Pilot Project Agreements with the APMA and the CCPA

None of the four respondents to the Registry proposal notice provided comments on the APMA pilot project.

MOE's Environmental Registry proposal notice included a link to the draft APMA pilot project agreement. However, the decision notice did not include a link to the proposed or final Agreement (the notice contained a link only to the Framework). In explaining this deficiency, MOE staff told the ECO that the APMA agreement was not finalized when MOE was ready to release the Framework.

The ministry's proposal and decision notices for the Framework and the APMA pilot project agreement noted that MOE might enter into other similar agreements with the CCPA, and pulp and paper mills in the Lake Superior basin. Those notices also contained MOE's commitment to post any such agreements on the Registry for public comment. As of May 2004, the ministry had not pursued agreements with paper mills. MOE has focused its efforts on manufacturing companies. The ministry neglected to post a Registry notice for the CCPA pilot project.

SEV

MOE did submit a document to the ECO outlining briefly how the ministry considered the principles contained in its Statement of Environmental Values (SEV) when making a decision on the Framework.

The ministry stated that the Framework fosters environmental protection because it promotes pollution prevention and sustainable development, and encourages industries to reduce environmental impact by moving beyond compliance with environmental requirements. MOE also noted that the Framework provides for an ecosystem approach by encouraging industries to continually improve their operations through reducing emissions beyond legislated limits. In addition, the ministry indicated that pollution reduction strategies developed by facilities under the Framework could apply to air, land and water and the interrelations between them. The ministry has asserted that the Framework encourages industries to conserve energy and water, reduce waste and improve air quality.

The SEV consideration document does not explain how the APMA pilot project meets MOE's SEV principles. Ministry staff advised the ECO that the ministry viewed the Framework and APMA pilot project as the same entity, and that the pilot project is consistent with the Framework. While the ECO understands MOE's rationale, the ministry should have clarified that point in its SEV consideration.

Other Information

Related Components of Ontario's Environmental Regulatory System

Certificates of Approval

Certificates of Approval (Cs of A) are permits issued by an Ontario ministry under a specific provision in an Act or regulation. Cs of A are required for facilities that release emissions to the air, discharge contaminants to ground and surface water, or provide drinking water supply. Cs of A are also required for waste transport or disposal. Depending on the nature of the facility and the type of permit, a traditional or basic C of A may cover a whole facility, or emissions from a specific process or piece of equipment. A Basic Comprehensive C of A (Air) provides more flexibility than a traditional certificate. But, as indicated in the associated box, the Enhanced Comprehensive C of A, available only to facilities participating in the pilot projects provides special features and even greater flexibility.

Comparing Comprehensive Certificates of Approval (Cs of A)

	Enhanced Comprehensive Cs of A	Basic Comprehensive Cs of A (Air)
Eligible Facilities	- an incentive available exclusively to pilot project facilities under the Cooperative Agreements Framework	- available to those meeting MOE requirements for this type of permit (MOE has a "User Guide" dated April 2004)
Applicability	- applies to air and water emissions and waste management	- applies to air emissions only
Operational Flexibility	- operational flexibility limited only by the restriction of applicable regulations and the general operations of the facility - process changes and production increases (including expansions) are allowed without the need for a C of A amendment, subject to applicable emission limits	- operational flexibility limited to approved production rate specified in the C of A - allows modifications such as product reformulation and "de-bottlenecking" of production
Summary Report to MOE	- facility to submit a written summary report to MOE every two years	- facility to submit a written summary report to MOE every year
Expiry Date	- no expiry date on conditions that provide operational flexibility as long as the facility remains in a cooperative agreement	- five year renewal date on the condition providing limited operational flexibility
Other	- incorporates tailored administrative provisions on a case-by-case basis	- not applicable

Air Emission Tracking

Several MOE air emission requirements apply to facilities that wish to enter into a pilot project under the Framework.

Facilities must submit an Emission Summary and Dispersion Modeling (ESDM) Report that reflects current air emission rates. An ESDM process has been in place since 1998 to provide for a transparent review of air emissions. Within an ESDM Report, businesses and industries must: describe the facility and identify all air emission sources; determine the maximum emission rate for each contaminant and source; perform modeling to show how the contaminant will disperse in the air; and, document the results using a standard format.

Facilities must also report emissions of a wide variety of compounds if those releases have been above prescribed upper limits, in accordance with Ontario's Airborne Contaminant Discharge Monitoring and Reporting Regulation (O.Reg. 127/01). MOE plans to use this information to verify that a facility's emission reductions were not achieved through, for example, cuts in production (not credited under the pilot projects).

Related Initiatives in other Jurisdictions

MOE says that it modeled the Cooperative Agreements Framework after similar initiatives in jurisdictions such as the United States federal government (Environmental Protection Agency) and the State of Oregon. Environment Canada also takes a similar approach through its Environmental Performance Agreements policy. Design criteria for the Environmental Performance Agreements include: senior-level commitment from participants; clearly defined roles and responsibilities for participants; clear environmental objectives with measurable results; stakeholder consultation; public reporting and verification of results; the provision of incentives and consequences; and, continual improvement.

Environmental Management System

All facilities participating in pilot projects under the Cooperative Agreements Framework must have an Environmental Management Systems (EMSs) in place. An EMS is part of an organization's overall management process that addresses short-term and long-term environmental impacts of products, services and processes. An EMS should increase a facility's ability to identify and mitigate environmental impacts arising from its activities.

According to the ministry, facilities participating in pilot projects under the Framework must have an EMS that:

- Documents the EMS policy
- Identifies environmental impacts and legal requirements
- Establishes employees' roles and responsibilities for meeting the EMS and legal requirements
- Sets measurable objectives and targets (for managing potential impacts) and evaluates progress;
- Includes a compliance tracking system and compliance audits
- Requires corrective action for areas of EMS non-conformance or legal non-compliance
- Provides for a management review of the EMS, to ensure the management system evolves to meet changing circumstances.

Background to the Framework: Managing the Environment – A Review of Best Practices

On February 7, 2001, the former Ontario government accepted a report entitled *Managing the Environment - A Review of Best Practices*. *Managing the Environment* (also known as the "Gibbons Report") was prepared at the request of the Secretary of Cabinet. The report was written to provide the government with: "an independent review of *best practices* [emphasis in original] with respect to how environment departments in other jurisdictions meet current challenges and execute their various management responsibilities." The report, which was undertaken primarily as a response to the Walkerton tragedy, advocated that several "strategic shifts" occur within MOE and the provincial government as a whole.

Three of the strategic shifts relate particularly to the Cooperative Agreements Framework, and the APMA and CCPA pilot projects. The report asserted that leading government jurisdictions foster a culture of continuous improvement where regulated companies make progress in their performance and environmental conditions are enhanced. *Managing the Environment* also advocated the development of flexible compliance tools, meaning that Ontario should place less emphasis on setting rules to regulate companies and more emphasis on setting outcomes that the companies would meet. That model would include the development of cooperative agreements. In addition, *Managing the Environment* recommended that government, the community and industry share responsibility for environmental protection. To foster that sharing, the report highlighted the need for third party verification of results, and ongoing monitoring and reporting, features which appear in the Framework.

Although the government changed in the fall of 2003, MOE has advised the ECO that the ministry continues to operate using *Managing the Environment's* principles. As such, the philosophical underpinnings of the Cooperative Agreements Framework remain supported.

Related History: REVA – Recognizing and Encouraging Voluntary Action

In 1999, MOE finalized a policy structure entitled Recognizing and Encouraging Voluntary Action (REVA) to provide "greater operational flexibility and administrative efficiency" to industrial facilities that voluntarily and consistently adhered to high standards of environmental planning, performance and accountability, "in excess of regulatory requirements and in accordance with ministry environmental objectives and priorities." While program-specific differences exist between REVA and the current Cooperative Agreements Framework, the underlying premise of REVA was the same.

REVA also included a proposed demonstration phase entitled "Performance Plus+", a Program to Recognize and Encourage Voluntary Action. Industrial facilities could sign a written agreement with MOE for an initial term of three years contingent on meeting conditions such as a ministry-sector agreement on pollution prevention and reduction, and a demonstrated commitment to operate beyond regulatory requirements.

Ultimately, the ministry did not implement REVA. MOE advised the ECO that REVA was a new concept for the ministry and as such, it took some time to get internal mechanisms off the ground. Meanwhile, the industrial sector progressed and the ministry decided to move forward with a revised approach (the current Framework) with the goal of making voluntary agreements stronger.

For more information on REVA, please refer to pages S4-14 to S4-17 of the ECO's 1999/2000 Supplement to the annual report.

ECO Comment

Environmental Protection

The *Framework for Ontario's Cooperative Agreements* has the potential to assist Ontario companies in reducing pollution and advancing environmental improvements through the setting of numerous pollution reduction targets beyond legal limits. The ECO trusts that the ministry's efforts to administer the Framework program will not detract from the great amount of work needed to update the province's air standards and air dispersion model. (For further information, see pages 59-62 of the 2002/2003 annual report).

Future changes to provincial air dispersion modeling requirements or air standards could have an impact on the targeted quantities for pollution reduction. But, the Framework does commit the ministry to consulting with participating facilities on potential new regulatory requirements and to providing as much advance notice of changes as possible.

The ECO appreciates that facilities' participation in the Framework program is contingent on a sound environmental track record and the ongoing use of an environmental management system. However, the ECO hopes that MOE does not engage in less frequent monitoring of participating facilities' compliance with provincial environmental laws.

Use of the Environmental Registry

The ECO commends MOE for providing a 90-day comment period for the Registry proposal notice. This extended time period is consistent with the ECO's 1996 guidance document: *Implementing the Environmental Bill of Rights: Environmental Registry Notice and Comment Procedures* that encourages ministries to provide more than the 30-day minimum comment period for proposals with high public interest and high complexity.

Unfortunately, the ministry's Registry decision notice only addressed the Framework. MOE neglected to update the notice upon finalization of the APMA pilot project in September 2003. The ECO suggests that, in the future, the ministry post separate notices for related policy proposals, with cross-references between each. This would ensure that delays in making a decision on one policy proposal would not affect the timing of decision notices for the others, and would allow outstanding proposals to be clearly identified by Registry users. The ECO urges the ministry to update the decision notice to explain the portion of the decision relating to the APMA pilot project and to include an electronic link to that document. This will ensure that the Registry notice contains accurate and complete information.

By failing to post a Registry proposal notice for the CCPA pilot project, the ministry broke the commitment it made in the Registry notice for the Framework/APMA pilot project, and did not meet its obligation under the *EBR* to post environmentally significant policy proposals for public comment. The ECO expects the ministry to post proposal notices for any future sector-wide pilot projects or facility-specific cooperative agreements made under the Framework. The ministry also has an obligation to post policy proposal notices on the Registry prior to renewing the Framework, or the APMA or CCPA agreements. If MOE proposes to significantly modify any of the above documents prior to the expiry of their five-year terms, the ECO urges MOE to post policy proposal notices on the Registry.

In its Framework, MOE does not expressly commit to posting each facility's proposed Enhanced Comprehensive C of A on the Environmental Registry for public comment. The ECO believes that these proposed permits ("instruments") would normally warrant a Registry notice since they would be environmentally significant and would provide the facility with operational flexibility for a five-year term.

One of the ministry's incentives for participating facilities, a "guaranteed" 45-day decision timeframe for Enhanced Comprehensive Cs of A, could have *EBR* implications. Because these Cs of A should receive minimum 30-day comment periods, only approximately two weeks would remain for the ministry to incorporate public comments and issue the approval. The ECO agrees that MOE should be able to meet this level of service *in most cases*, unless the ministry's technical review or public input reveals contentious issues, or MOE knows at the outset that there are complex environmental issues and/or high public interest. In those cases, MOE should be prepared to provide a longer comment period.

The ministry's commitment to a 45-day turn-around time appears to leave no flexibility for special circumstances. This could place the ministry in the difficult position of either breaking its Framework commitment to the participating facility, or rushing the approval through without the extra diligence that some cases may warrant. Either course of action would be cause for concern. The ECO also questions the ministry's marketing of the 45-day timeframe as a special incentive for environmental leaders. An efficient processing time should be available to all applicants.

The ECO is concerned that MOE neglected to acknowledge in its Framework, or in its pilot projects with the APMA and CCPA, that the *EBR* provides certain appeal rights related to instrument approvals. While not likely to be a frequent occurrence, requests for appeal by the public could affect the implementation of an Enhanced Comprehensive C of A issued under the Framework.

The ministry could use the Registry as a useful tool when reporting or seeking input on progress made through pilot project implementation. The ministry could post an information notice on the Registry to advise the public of the availability of facilities' yearly progress reports (describing each facilities' advancement in meeting contaminant emission reduction targets). MOE could also use an information notice to advise Ontarians of the availability of its two-year review of the pilot projects. Doing so would provide a logical follow up to the other Registry proposal/decision notices posted for this program and would contribute to accountability and transparency. The ECO recommends that MOE place a policy proposal notice on the Registry to seek province-wide input as it develops its five-year review of the pilot projects.

Additional Comments

The ECO appreciates that MOE has developed the role of the Multi-stakeholder Management Committee to further the goal of shared responsibility for environmental decision-making. However, to foster neutrality, MOE may wish to have two sets of Committee members – to separate the task of reviewing facilities' entry applications from the responsibility for reviewing facilities' progress in meeting emission reduction targets. The ministry may also benefit from setting out in advance whether the Committee's recommendations to MOE will be available upon request or available through Ontario's *Freedom of Information and Privacy Act*.

As of May 2004, MOE had not yet developed a generic users guide for Enhanced Comprehensive Cs of A. The ECO suggests that the ministry develop such a guide to clarify expectations. Transparency will be important due to the broad flexibility provided by Enhanced Comprehensive Cs of A.

Conclusion

The ECO urges the ministry to review the Framework and pilot projects in light of the comments and suggestions above, and to make any adjustments necessary to ensure that this program fully protects the public's rights under the *EBR* and operates in a transparent manner. The ECO may review this program in more detail once implementation has progressed further.

Review of Posted Decision:
Amendments (O.Reg. 128/03) to the *OWRA* Wells Regulation (Reg. 903)

Decision Information:

Registry Number: RA02E0007	Comment Period: 60 days
Proposal Posted: April 5, 2002	Number of Comments: 67
Decision Posted: April 10, 2003	Came into Force: April 10, 2003

Description

The Wells Regulation (Regulation 903, R.R.O. 1990) under the *Ontario Water Resources Act* (*OWRA*) governs how wells are to be constructed, maintained and abandoned by setting minimum standards for all types of water wells – private, communal, municipal, industrial and commercial wells. Regulation 903 also sets licensing requirements for well contractors and technicians – persons and businesses involved in well drilling, well boring, well digging and well pump installation. Ontario Regulation 128/03 amended sections of Regulation 903 dealing with well construction, technician licensing, retesting, disinfection, annular space, sealants and other aspects of well use. MOE also introduced new sections to require the use of well identification tags, to deal with shallow works and for the continuing education of drillers. According to MOE, these amendments are part of a provincial groundwater strategy, announced in the interval after the contaminated water incident at Walkerton, Ontario. Mr. Justice O'Connor, who led the Walkerton Commission of Inquiry, suggested that MOE should review and update the Wells Regulation under the *Ontario Water Resources Act* "to ensure that it requires best construction practices." MOE acknowledges that wells can act as pathways for contaminants when they are not properly located, constructed, and maintained and that improper well abandonment can provide a direct route for contaminants to enter groundwater aquifers.

Implications of the Decision

The effect of amending Regulation 903 will be to force drillers, technical specialists and others to apply new requirements for well construction, maintenance, reporting and abandonment. Specifically, some of the new or amended practices resulting from O.Reg. 128/03 include:

- A well tagging system that places an identification marker on water wells so they may be easily identified at their location
- A new standard for disinfection, i.e., a lower concentration of chlorine which is intended to improve the disinfection capability of chlorine by minimizing the alteration of water chemistry
- Changes to the way wells are sealed, casings are installed and wells abandoned.

MOE's amendments were intended to improve the health and safety of drinking water supplies from wells and to protect groundwater resources across the province. In practice, much of the improvement will be contingent on the effective implementation of the new standards by well drillers. This, in turn, will partly be contingent on MOE's efforts to ensure that the new standards are implemented through oversight, monitoring and inspection.

Regulatory Impact Statement

MOE's Regulatory Impact Statement (RIS) was short and not very insightful, largely repeating information that was already provided: "The proposed changes to Reg. 903 increase groundwater quality protection; promote the responsibility and accountability of persons who construct wells and of well owners to maintain their wells and plug and seal unused wells. These proposed changes to the Wells Regulation (903) will strengthen standards for well construction, maintenance, and decommissioning, require proper training of Well Contractors and Technicians, and improve tracking and reporting of well location, status, and condition." MOE could have done a better job of articulating the likely impacts of this initiative, especially given the very detailed comments on this regulation from stakeholders during the comment period and the reaction of some stakeholders to the subsequent implementation of the amendments in late 2003.

Public Participation & *EBR* Process

In total, 67 commenters provided approximately 250 pages of comments over the 60-day comment period. Many of the submissions were extremely detailed, including comparisons to practices in other jurisdictions (e.g., Michigan) and connections to other Ontario legislation, (i.e. the *Building Code Act*). Overall, MOE did a relatively poor job of accounting for, and explaining the effect of this wide range of comments on the decision. MOE summarized the comments, and their effect, in the decision notice, according to the following five categories:

Annular Space

Cable tool drillers commented that meeting the proposed standard (three inches greater than the outside diameter of the casing) would impose technical and financial difficulties. MOE responded that it would retain the new standards for the majority of wells but add an option to use a smaller annular space (two inches) with additional rules for placement of casing and sealing.

Sealing Materials

Commenters were concerned about defining well sealants too narrowly, since requirements will vary with the type of well under construction and local conditions. MOE responded by broadening the definition of sealants in the regulation to provide more flexibility. The ministry also clarified the definition of bentonite by including a minimum solids content.

Elevated Pad

Some commenters disagreed with MOE that requiring an elevated pad around new wells would achieve the goal of providing a secondary barrier to contamination. MOE responded by removing the pad requirement and retaining the original wording that requires well drillers to finish a well such that water drains away from and does not pond in the vicinity of the well.

Training and Retesting of Well Technicians

Most persons that commented on these topics supported mandatory training but objected to mandatory re-testing. MOE therefore retained the mandatory training for new well technicians but replaced re-testing of licenced technicians with mandatory continuing education (i.e., 21 hours over a three-year period).

Standards for Geotechnical Wells

Commenters from the geotechnical industry expressed concerns about applying the same standards for water wells to test holes, dewatering wells and monitoring wells. MOE's response was to maintain that these types of wells comply with Regulation 903, except for those which the ministry proposed to be exempt, i.e., shallow holes – those less than three meters in depth. MOE did, however, reduce the reporting requirements of geotechnical wells through cluster reporting. The ministry also clarified standards for water supply wells that do not apply to test holes and monitoring wells (e.g., siting, potability, extending casing above grade) and provided a method for the proper abandonment of geotechnical wells.

Based on the above, MOE showed some flexibility in adopting stakeholder concerns. The ministry deserves credit for resisting calls to introduce these new standards through a guideline or code of practice as opposed to a regulation; such an approach may have limited the ability of MOE to ensure protection of health and safety because of enforcement limitations. From this perspective, MOE displayed a reasonable balance of flexibility while not unduly compromising key elements of environmental protection or health and safety. Nevertheless many detailed, pertinent and potentially workable comments were provided to MOE which the ministry did not account for, as listed below:

- That grouting the annular space of a well to a depth of 20 feet was an "unmerited change" and especially difficult for cable tool drillers, this according to a number of commenters; (MOE appears to have done little to alleviate this concern, perhaps because of health and safety considerations. If so, the ministry should have explained this).
- A separate section for municipal and communal wells should be considered for the regulation.
- Some subsurface investigations are undertaken on a confidential basis; one commenter questioned continued confidentiality given the new reporting requirements (this concern may have been alleviated by MOE's revision of the amendments. If so, MOE should have explained this).
- The revised Wells Regulation should require that a professional engineer be ultimately responsible for any construction related to well-based community water systems.
- A local (i.e., municipal) permitting program should supervise the drilling or digging of the well to ensure well installation is done appropriately.
- That contractors need to fulfill only the minimum obligations of the Wells Regulation, whereas site-specific conditions may require that standards exceed the regulation. This commenter, from a municipality, wanted the well regulation to specify that the contractor must build according to the requirements of a local planning authority and for the province to consider the *Building Code Act (BCA)* as a means to ensure wells are built to necessary standards. The *BCA* could be amended to allow a municipality to withhold building permits until it is satisfied with well construction.
- The suggestion from a township representative that an enforcement model like that for septic systems is needed, or that MOE could modify the regulation to permit the ministry to delegate inspection duties to municipalities.
- That MOE include provisions for the enforcement of this regulation, otherwise these efforts will be to no end, according to one conservation agency.

These more detailed and specialized concerns were not described in the decision notice and do not appear to have been addressed by MOE in making its final decision. It is possible that MOE has developed internal guidance or planning on some of these matters, although ECO is not aware of these efforts. Other suggestions such as those from commenters involved in dewatering, mining and geotechnical investigations, e.g., that test holes be dealt with in a separate regulation, may not have been not adopted by MOE, but some of the changes that MOE made to the test hole provisions may have sufficiently satisfied some of these commenters. In fairness to MOE, there were so many comments, some very detailed, that it would have been difficult for MOE to adequately treat all of them in its decision notice (a separate comment summary document would have been required).

Furthermore, in many areas covered by this regulation, e.g., well construction, outreach, tag management, commenters suggested ways in which the ministry could have gone further. For the most part, these suggestions were not incorporated into the revised regulation. In some cases, the ministry could have dealt with these issues by proposing to incorporate the suggestions into its operations. If it has done so, MOE should have informed commenters that their suggestions were being implemented.

Process Issues

One organization raised a legitimate process issue. In 1998, MOE posted a proposal (RA8E0025) on the Registry regarding amendments to the Wells Regulation (as of May 2004 it was still on the Registry as a proposal). This is potentially confusing to a member of the public who may be tracking this issue. MOE should have closed that particular posting with a decision notice (if this in fact was the case at the time) and notified the public that a new consultation process was underway.

Another potential process issue involved the fact that the amendment that changed the disinfection method was introduced into the final regulation, but not listed in the proposal. This is potentially problematic, as many of the persons who made comments on the proposal might have wished to comment on this provision.

SEV

MOE prepared a SEV briefing note claiming that three values in MOE's SEV were consistent with the intent of this regulatory proposal:

Environmental Protection

MOE explained that there is a need to update and strengthen standards for wells to better protect groundwater supplies and the quality of drinking water for millions of Ontarians who are direct users of groundwater. Wells can act as pathways for contaminants when they are not properly located, constructed, and maintained. Improper well abandonment can provide a direct route for contaminants to enter groundwater aquifers. The proposed changes to Regulation 903, under the *Ontario Water Resources Act* will enhance environmental protection by updating and strengthening standards for well construction, maintenance, and decommissioning; require proper training and education of well contractors and technicians; and improve the tracking and reporting of well location, status, and condition.

The Ecosystem Approach

MOE stated that the proposed changes to Regulation 903 will increase groundwater quality protection and will promote the responsibility and accountability of persons who construct and maintain wells (including the well owner) and those who plug and seal unused wells. Human activities and land-use patterns in Ontario over the past two decades have significantly increased the proximity and number of potential sources of contamination to which wells and well water can be exposed. Improper locations for new wells, poor construction and lack of maintenance pose a potential health risk to the users of these wells. Also, failure to properly plug and seal old wells poses a serious risk to groundwater, by providing easy entry of surface water and foreign materials into the water table.

Resource Conservation
MOE also contended that changes to Regulation 903 will fulfill a key component of Operation Clean Water, namely to update and strengthen the standards for wells to better protect the quality of groundwater and drinking water supplies.

Other Information
Within a few months of this decision being posted, a lengthy, complex application was filed with the ECO for a review of the adequacy and implementation of this amended regulation. The application raised concerns about well water safety because of the amendments to Regulation 903 or their implementation in August 2003. In particular, the applicants believed that the revised regulation created confusion, failed to ensure disinfection, and could be difficult to enforce. The ministry denied the review and defended the safety and technical merits of the revised regulation (see review of R2003007 in the applications section of this Supplement). However, in July 2004 the minister asked the Advisory Council on Drinking-water Quality and Testing Standards created under the *Safe Drinking Water Act* to review the chlorination and disinfection issues raised by the applicants and report back to her in the fall of 2004.

ECO Comment
There are a variety of reasons to drill or bore into the earth, as well as several types of drilling and boring techniques employed by the geotechnical and well drilling industries. There are a variety of different types of earth materials (e.g., sand, gravel and clay; sedimentary, metamorphic or igneous rock) that can be encountered in subsurface activities. When constructing a water well, there is a range of materials and techniques that could potentially be used. A well may, or may not be used for drinking water purposes. For these reasons, it can be difficult to specify in a regulation a tightly defined and uniform set of provisions to fairly and effectively regulate all types of subsurface investigation and well installation. Some flexibility and some exemptions in well regulations are understandable given the widely varying purposes for installing wells, i.e., everything from short-term monitoring and testing needs to a longer lasting residential water supply for drinking purposes. Bearing this in mind, MOE attempted to strike a balance between prescribing requirements and leaving some measure of discretion and flexibility for those persons regulated by, or applying the regulation.

On the whole, water wells in Ontario have proved to be reliable sources of drinking water for millions of Ontarians. MOE, drillers, municipalities, well owners and others all have a role to play ensuring that this valuable resource is protected. Some of the measures of Regulation 903, like the well identification tags and abandonment procedures represent new or improved practices, which should help to safeguard Ontario's groundwater if properly implemented and enforced.

The well regulation should require best construction practices as recommended by Mr. Justice O'Connor. However, concerns have been raised (for example, through the *EBR* application R2003007) that the new well regulation, as currently drafted, does not meet those intentions, especially with regard to private domestic wells. For example, there are concerns that the regulation does not require well constructors to verify (through water testing) that new wells have indeed been disinfected. Nor is there a requirement that well contractors disinfect private wells after carrying out repairs. As well, Justice O'Connor noted the importance of thoroughly applying the existing licensing system to the well construction and maintenance industry. But the new regulation, on its own, will not be able to resolve the issue of unlicensed practitioners carrying out work on private wells – a practice which apparently remains wide-spread in some areas.

Overall, MOE did a relatively poor job of accounting for, and explaining the effect of the wide range of comments on the decision. MOE did not explain the resolution of some comments in the decision notice (admittedly, some of these comments were complex). Perhaps MOE has developed internal guidance on these matters, but if so, the ministry did not indicate that it did so. Further, in many areas, e.g., well construction, outreach, tag management, in which the regulation was amended, commenters suggested ways in which the ministry could have been more rigorous. For the most part, these suggestions were not incorporated in the regulation. The ministry may have incorporated some of these suggestions into its operations, e.g., inspections, outreach, approach to enforcement and compliance but this wasn't explained in the decision notice or other related educational information. If so, MOE should have informed commenters that their suggestions are being implemented or are under consideration.

Concerns have also been raised that many technical details stipulated by the regulation (rules on shallow test holes, for example) are not workable in practice. The ECO has also heard concerns that some environmentally important requirements (such as rules on well tags and rules for separation distances between septic systems and wells) have been worded in such a way that they are not enforceable. It appears that, in order to make the new regulation a truly effective tool for drinking water protection, the ministry should correct a number of technical deficiencies, clarify language to reflect on-the-ground practices, and think through the various enforcement challenges that need resolution to meet the intentions of Mr. Justice O'Connor.

Several municipalities apprised MOE of the difficulties they have ensuring that proper well construction, development, and testing are carried out by contractors in their jurisdiction. The municipalities indicated that either MOE needs to increase its inspection efforts or the Ontario government should provide them with enhanced powers to ensure appropriate well standards are met. These are substantive matters that MOE did not address through this decision. However, MOE does have pilot projects underway in eastern Ontario that involve delegation of certain well inspection duties to the local municipality.

Review of Posted Decision:
New Drinking Water Regulation under the *Safe Drinking Water Act, 2002*

Decision Information:

Registry Number: RA03E0001	Comment Period: 60 days
Proposal Posted: January 14, 2003	Number of Comments: 68
Decision Posted: March 15, 2003	Decision Implemented: June 2003

Description

Most Canadians consider safe drinking water to be a basic right, fundamental to human health. The Walkerton tragedy provided a startling reminder of the consequences of neglecting to protect a drinking water supply from contamination. In response to the tragedy, the Government of Ontario established a public inquiry to report on the causes of contamination and to make recommendations to ensure the safety of Ontario's drinking water. In his two-part Walkerton Inquiry report, Commissioner O'Connor recommended the enactment of a *Safe Drinking Water Act* to "…gather in one place all legislation and regulations relating to the treatment and distribution of drinking water." In response, the *Safe Drinking Water Act* (*SDWA*) was passed in December 2002. The *SDWA* expands on existing policy and practice, introduces new features to protect drinking water in Ontario and protects human health through the regulation and control of drinking water systems and testing.

O.Reg. 170/03, the Drinking Water Systems Regulation (DWSR), is a new regulation under the *SDWA* that consolidates the requirements from O.Reg. 459/00, the Drinking Water Protection Regulation for Larger Waterworks and O.Reg. 505/01, the Drinking Water Protection Regulation for Smaller Waterworks serving Designated Facilities, both under the *Ontario Water Resources Act (OWRA)*. The DWSR also covers other systems previously not regulated including smaller residential systems and commercial and institutional systems serving drinking water to the public. The purpose of the DWSR is to ensure the provision of safe drinking water to all residents of Ontario by stipulating minimum standard requirements.

The DWSR outlines drinking water quality standards, approvals, minimum levels of treatment, procedures for operational checks, sampling and testing and requirements for posting warning notices when the regulation cannot be met. The DWSR regulates eight different categories of drinking water systems outlined in the box below. The key requirements for each category are outlined in Table 1.

Prior to the DWSR, large municipal systems required a C of A issued under the *OWRA*. The new rules require an approval under the *SDWA* for Large Municipal Residential and Small Municipal Residential systems, which eventually will be replaced with a municipal drinking water licence. These licences will include a works permit and operational plan. All other systems require a professional engineer to prepare an evaluation report that specifies the class of system and certifies compliance with treatment requirements. Subsequent reports are required every five years for surface water and every 10 years for ground water.

In Part Two of the Walkerton Inquiry Report Justice O'Connor noted that the requirements under the Drinking Water Protection Regulation may have been stricter then necessary (refer to p. 105 of the ECO's 2002/2003 Supplement). As a result, MOE changed some of the requirements under the DWSR to include:

- Decreased frequency requirement for chemical sampling
- A move from quarterly to annual reporting
- An engineering report done every five years for surface water and 10 years for ground water as opposed to every three years
- Technical changes to address automated reporting systems.

The MOE passed eight administrative regulations to support the DWSR, four under the *SDWA* and four under the *OWRA*. The four under the *SDWA* include: the Ontario Drinking Water Quality Standards Regulation (O.Reg. 169/03), which establishes the enforceable drinking-water standards under the *SDWA*; the Definitions of Words and Expressions used in the Act Regulation (O.Reg. 171/03) that includes definitions, which apply to all regulations under the *SDWA* and addresses the application of sections under the *SDWA*; the Schools, Private Schools and Day Nurseries Regulation (O.Reg. 173/03), which sets requirements for weekly flushing for schools, private schools and day nurseries; and the Definition of "Deficiency"; and "Municipal Water Systems" Regulation (O.Reg. 172/03), which defines what a deficiency is with respect to a drinking water system. This last regulation also prescribes certain non-municipal drinking-water systems to be municipal drinking-water systems for the purposes of the *SDWA*.

Eight Categories of Drinking Water Systems Outlined in O.Reg. 170/03

Large Municipal Residential
Serves a major residential development of more than 100 private residences.

Small Municipal Residential
Serves a major residential development of fewer than 101 private residences.

Large Municipal Non-Residential
Does not serve a major residential development and is capable of supplying drinking water at a rate of more than 2.9 litres per second.

Small Municipal Non-Residential
Does not serve a major residential development and is capable of supplying drinking water at a rate of no more than 2.9 litres per second and serves a designated facility or a public facility.

Non-Municipal Year-Round Residential
Serves a major residential development or a trailer park or campground with more than five service connections.

Non-Municipal Seasonal Residential
Serves a major residential development or a trailer park or campground that has more than five service connections.

Large Non-Municipal Non-Residential
System capable of supplying drinking water at a rate greater then 2.9 litres per second and does not serve a major residential development or a trailer park or campground with more than 5 service connections.

Small Non-Municipal Non-Residential
System not capable of supplying drinking water at a rate greater then 2.9 litres per second and serves a designated facility or public facility but does not serve a major residential development or a trailer park or campground with more than 5 service connections.

The four administrative regulations under the *OWRA* include: a Regulation to Revoke O.Reg. 459/00, the Drinking Water Protection Regulation for Larger Waterworks (O.Reg. 175/03); a Regulation to Revoke O.Reg. 505/01, the Drinking Water Protection Regulation for Smaller Waterworks serving Designated Facilities (O.Reg. 176/03); a Regulation to amend O.Reg. 525/98, Approvals and Exemptions (O.Reg. 174/03); and a Regulation to amend O.Reg. 435/93, Waterworks and Sewage Works (O.Reg. 177/03). These eight administrative regulations support the DWSR with the purpose of outlining drinking water quality, systems and distribution in Ontario.

Table 1 Microbiological testing and chemical testing required under O.Reg. 170/03. (Note: changes proposed by MOE in May 2004 are not reflected in this chart.)

CATEGORY	Large Municipal Residential	Small Municipal Residential, Large Municipal Non-Residential, Non-Municipal Year-Round Residential and Large Non-Municipal Non-Residential	Small Municipal Non-Residential and Non-Municipal Seasonal Residential	Small Non-Municipal Non-Residential
Frequency of Distribution Samples	< 100,000 people eight samples per month if >100,000 people 100/month plus 1 sample for each additional 10,000 people.			
Chlorine used		1/week	every 2 weeks	every 2 weeks
Chlorine not used		2/week	1/week	1/week
Raw Sample		1/month	1/month	1/month
Reduction in Sampling by ½ after 24 consecutive months with no adverse results		√	√	√
CHEMICAL TESTING				
Organics and inorganics	Surface Water (SW)= 1/12 months Ground Water (GW)=1/36 months	SW= 1/12 months GW= 1/36 months	1/60 months	Designated Facilities only 1/60 months
Nitrate and Nitrite	quarterly	quarterly	quarterly	quarterly
Lead	1/12 months	1/12 months	1/60 months	1/60 months
Trihalomethanes (if chlorinating or chloraminating)	quarterly	quarterly	quarterly	not required
Sodium	1/60 months	1/60 months	1/60 months	1/60 months
Fluoride (if not fluoridating)	1/60 months	1/60 months	1/60 months	1/60 months

Implications of the Decision

Prior to the Walkerton tragedy, drinking water standard-setting in Ontario was mainly governed by procedural guidelines and voluntary standards under the Ontario Drinking Water Objectives. Following the Walkerton disaster, the Ontario government passed O.Reg. 459/00, Drinking

Water Protection for Larger Waterworks, followed by O.Reg. 505/01, Drinking Water Protection for Smaller Waterworks serving Designated Facilities. Three new laws were also enacted: Bill 81, the *Nutrient Management Act*, Bill 175, the *Sustainable Water and Sewage Systems Act* and Bill 195, the *Safe Drinking Water Act*. These three laws are vital to securing a safe drinking water supply for Ontario and were reviewed in the 2002/2003 ECO annual report and Supplement.

The DWSR legally requires a minimum level of drinking water treatment, outlined in the schedules of this regulation, which specify the parameters of testing and mandatory standards. However, this regulation does not address the causes of drinking water contamination, nor does it make clean and safe drinking water a clear legal right. Furthermore, the cost and complexity of meeting the requirements of this regulation may be difficult for some owners, especially those of smaller systems.

Public Participation & *EBR* Process

On January 14, 2003, MOE posted a notice about the proposed DWSR on the Environmental Registry and provided a 60-day comment period. MOE summarized each section of the new regulation in a clear and technical manner and provided additional supporting material accessible by electronic links. In total, 68 comments were received from multiple stakeholders including representatives from non-municipal systems, public health departments, municipalities, consultants, professional associations, analytical laboratories, school boards, non-governmental organizations, industry and other ministries.

On June 19, 2003, MOE posted a decision notice on the Environmental Registry for the DWSR. MOE states that it considered the 68 comments received during the *EBR* posting, and in response made the following changes:

- The creation of a new Drinking Water Systems category: Small Municipal Residential, where the requirements are tailored to small systems which include, for example, reduced microbiological testing requirements for systems serving less then 100 private residents.
- Food premises regulated under the *Health Protection and Promotion Act* are prohibited from posting warning notices in place of providing treatments and testing.
- Phase out of the option of posting warning notices instead of providing treatments and testing, which will come into effect three years following the treatment deadline. This, however, does not apply to systems without electrical power, systems consisting only of a public lavatory and churches and service clubs exempt from food premises regulation.
- Change in the date of annual reporting to cover the calendar year for all systems except non-municipal seasonal residential, large non-municipal non-residential systems (November 1-October 31) and small non-municipal non-residential systems (April 1- March 31).

Although the comments generally indicated support of the new regulation, noteworthy concerns raised in the comments not addressed in MOE's revised regulation include:

- A lack of cross-connection control to address the hazards of backflow from private plumbing systems connected to public water distribution systems.
- Concern that the Advisory Council has not yet been established to make recommendations based on risk-based standards.

- Concern over the financial costs associated with the new approval and testing requirements, especially for small systems. Part Two of the Walkerton Inquiry Report estimated that the one-time cost of steps taken by the Ontario government after Walkerton would be between $100 and $520 million with an ongoing annual cost between $41 to $200 million.
- Concern about the lack of source protection policy and law.
- Concern that there will be an insufficient number of accredited labs and engineers to respond to the demand, especially in Northern Ontario and other remote areas.

Despite these concerns not being addressed MOE did provide additional clarification on how false positives would be handled in the testing protocols, the requirements of testing, monitoring, recording and reporting data, clarification around the categories of systems and the corrective action necessary when requirements are not met. Clarification concerning point of entry treatment, which occurs at the point where water from the system enters a building or other structure, was also given. This clarification details when secondary disinfection is not required provided that specific criteria are met.

SEV

MOE's SEV consideration document noted that the DWSR is consistent with the three principles of its SEV: environmental protection, resource conservation and the ecosystem approach. MOE stated that the purpose of this regulation is to protect public health through sampling, testing and notification. Thus, environmental protection will not be affected. Secondly, the regulation does not affect protection or conservation of Ontario's surface water and ground water, nor does the regulation interfere with other provincial regulations or policies aimed at ensuring that ground and surface waters of Ontario are protected, conserved and available for environmental, social and economic enhancement of Ontario. Finally, MOE maintains that ecosystem needs and uses of water are not adversely affected, as the ground and surface water of the hydrologic system are not impaired. The ECO accepts that MOE sufficiently considered its SEV in the development of the DWSR.

Other Information

On June 26, 2003, MOE posted on the Environmental Registry the Proposed Compliance and Enforcement Regulation made under the *Safe Drinking Water Act, 2002* (RA03E0026). The proposed regulation outlines the requirements for inspection of drinking water systems and laboratories providing drinking water testing services. The proposed regulation also outlines the conduct for investigation, enforcement and inspection and permits any resident in Ontario who believes the *SDWA*, or a regulation or instrument under the *SDWA* has been contravened to submit an application for investigation to MOE.

Regarding drinking water disinfection, the ECO notes that in April 2003, MOE consulted on its "Procedure for Disinfection of Drinking Water" through a notice on the Registry (PA03E0004). In June 2003, MOE posted its decision to proceed.

On December 18, 2003, MOE announced a one-year immediate moratorium on new and expanded water-taking permits, which remove water from watersheds. The Minister of the Environment also announced that the Ontario government plans to charge fees to water-bottling companies and other permit holders that remove water from watersheds. In addition, the minister also established two committees to work on source protection: a Technical Expert Committee to advise on the threats to drinking water sources and an Implementation Committee to advise the government on how to implement strategies to protect watersheds.

On January 28, 2004, the following proposals were posted on the Environmental Registry by the Ministry of Health and Long-Term Care (MOHLTC) and MOE:

- Protocol Respecting Safe Water Program, which is intended to clarify the responsibilities of MOE and boards of health concerning the notification and indicators of adverse drinking water quality (PG04E0001).
- Safe Water Program under the Mandatory Health Programs and Services Guidelines is proposed to be updated (PG04E0002).
- Memorandum of Understanding between the Ministry of the Environment and the Ministry of Health and Long-Term Care Concerning the Safe Water Program, with the purpose of clarifying the roles of MOHLTC and MOE staff respecting drinking water systems (PG04E0003).
- Drinking Water Sampling Protocol to establish standard operating procedures (PG04E0004).
- Protocol for the Issuance of a Boil Water or Drinking Water Advisory, to outline the circumstances that would warrant the issuance of Boil Water or Drinking Water Advisory and will bring uniformity to the process (PG04E0005).
- Drinking Water Haulage Guidelines that prescribes the requirements for drinking water haulage vehicles to meet the microbiological standards set out in O.Reg. 169/03, Ontario Drinking Water Quality Standards (PG04E0006).

The purpose of all of these proposals is to ensure that standards and procedures correspond to the requirements outlined in the *SDWA* and the DWSR.

MOE posted the White Paper on Watershed-based Source Protection Planning (White Paper) on the Environmental Registry on February 12, 2004 (PA04E0003). The White Paper details planning aspects of proposed source protection legislation and outlines improvements to the Permit to Take Water Program. Components of the proposed source protection legislation include a watershed-based approach to planning and the formation of a Source Protection Planning Committee and a coordinating body to recommend a plan for the approval of the province.

In early 2004, some rural municipalities and operators of non-municipal drinking water systems at facilities such as community centres began to sound alarm bells in the media and with their MPPs about the impact of O.Reg. 170/03 on their ability to continue to provide water supplies to their residents and clients.

In May 2004, MOE proposed amendments to the DWSR which respond to these concerns. The proposed amendments will give the ministry time to consult over the summer of 2004 with rural municipalities and operators of non-municipal drinking water systems, medical officers of health and health officials on making the regulation more workable. The proposed amendments were posted to the Registry for a 30-day public comment period which ended in June 2004.

Under the proposed amendments, which affect both municipal and privately-run drinking water systems, the treatment deadlines will be extended from July 1, 2004 to December 31, 2004 for surface water systems in the three categories listed below, as long as the system does not serve a designated facility (i.e., school or health/social care facility):

- Non-municipal year-round residential systems (i.e., mobile home parks, subdivisions, condos/apartments)
- Large non-municipal non-residential systems (i.e., systems serving hotels, resorts and campgrounds with less than six hook-ups)
- Large municipal non-residential systems (large community centres and recreational facilities, for example, capable of supplying water at a rate greater than 2.9 litres per second)

The treatment deadline for groundwater water systems in the three categories listed above remains December 31, 2005. Other changes to O.Reg. 170/03 include:

- Small municipal non-residential systems (i.e., systems serving small community centres and town halls not capable of supplying 2.9 litres of water per second) will be allowed to post signs until December 31, 2004 rather than conduct tests required by the regulation. Signs would state that the water has not been tested or treated for drinking water purposes.

- Small non-municipal non-residential systems (i.e., motels, resorts and restaurants not capable of supply 2.9 litres of water per second) will receive a deadline extension to June 1, 2005 to notify the ministry of their intention to comply, apply for relief from treatment or post warning notices.

- MOE has proposed changes to the sequence of corrective actions for some adverse test results. MOE states the changes will encourage operators to immediately correct a problem related to an adverse test. In addition, the definition of 'food premises' will be clarified so that systems that do not serve the public, such as food manufacturers, are not included in the regulation.

MOE insists that the majority of systems will continue to have to meet standards, sample and test, use accredited laboratories for microbiological and chemical testing and provide immediate notification of any adverse test results as required by the *SDWA* and O.Reg. 170/03. On June 23, 2004, MOE posted a Registry notice on its decision to proceed with these changes, and the updated regulation has been published on E-laws, the Ontario government's Web site with the full text of Ontario laws and regulations.

On May 14, 2004, O.Reg. 128/04 (Certification Of Drinking Water Systems Operators and Water Quality Analysts) was filed with the Registrar of Regulations. O.Reg. 128/04 contains the requirements for certification and related training of operators of municipal and regulated non-municipal drinking water systems and drinking water system water quality analysts. It replaces sections of O.Reg. 435/93 made under the *OWRA*. The new regulation clarifies and strengthens requirements in several areas including:

- Grandparented operators will have to be recertified. Those designated as overall responsible operators will have to be recertified within one year of May 2004; others within two years;

- Training requirements are clearly defined and include continuing education and on-the-job-practical training. The new course content includes a minimum of 10 per cent on the subject matter specifically identified by Justice O'Connor in his Walkerton Inquiry reports; and

- All operators will have to be recertified every three years conditional on successfully completing specific number of hours of training. The number of hours of training each operator will be required to take is graduated, with a higher number of hours for higher-class (i.e., more complex) drinking water systems.

ECO Comment

Ensuring that all waterworks supply safe drinking water is critical to the health and well being of the residents of Ontario. The DWSR is fundamental to achieving this objective and MOE should be commended for developing this regulation under the *SDWA*. This regulation responds to some of the perceived weaknesses and shortcomings in O.Reg. 459/00 and O.Reg. 505/01 to safeguard all drinking water systems in Ontario. The DWSR provides for the proper sampling and testing of drinking water and reporting requirements that will allow MOE to monitor drinking water treatment and distribution systems.

This regulation is complex and difficult to understand, particularly for non-experts. MOE has provided useful background materials to support the implementation of this regulation including technical updates, kits and procedural guides and the ECO commends the ministry for this work.

ECO commends MOE for undertaking a thorough public consultation process and taking into account many of the concerns and recommendations of the public. However, the ECO agrees with the stakeholders who expressed concern for the continued lack of source protection policy and law in Ontario. As Justice O'Connor articulated in Part 2 of the Report of the Walkerton Inquiry, multiple-barrier systems are essential for providing long-term safe drinking water because they offer a degree of redundancy to guard against the failure of any one barrier. MOE has focused its attention on treatment, securing the distribution system, monitoring and planning responses to adverse conditions – but has, until recently, paid insufficient attention to source protection. MOE's release of its White Paper on Source Protection is a promising sign, but it is unclear if the proposals contained in that paper will ensure that watersheds and ecosystem values are adequately protected and enhanced. Although the DWSR is essential to the implementation of the *SDWA*, MOE must develop an integrated policy on drinking water to address concerns about the need for source protection. The ECO will continue to monitor the implementation of the *SDWA* regulations as well as the development of source protection legislation.

Review of Posted Decision: MOE Declaration Order regarding MNR's Class Environmental Assessment Approval for Forest Management

Decision Information:

Registry Number: RA03E0004	Comment Period: 30 days
Proposal Posted: March 13, 2003	Number of Comments: 603
Decision Posted: July 7, 2003	Came into Force: OIC approved June 25, 2003

Description

In June 2003, MOE issued a new approval for MNR to carry out forestry activities under the *Environmental Assessment Act* (*EAA*). MOE posted the Declaration Order regarding MNR's Class Environmental Assessment for Forest Management (the Declaration Order) on the Registry for a 30-day comment period before it was finalized. The Declaration Order replaces the 1994 Class Environmental Assessment Approval for Timber Management on Crown Lands in Ontario (the Timber Class EA). The ECO does not usually review EA approvals, but declaration orders are regulations for the purposes of the *EBR* and must be posted on the Registry for public comment.

The Declaration Order allows MNR to proceed with its undertaking of forest management planning and its interrelated activities, subject to 55 terms and conditions. The undertaking includes road building, logging, replanting and using pesticides, as provided by the *Crown Forest Sustainability Act* (*CFSA*), its regulations and regulated manuals. The Declaration Order applies to the "Area of the Undertaking," a 385,000 square kilometre area of Crown land in central and northern Ontario currently divided into 50 forest management units.

Conditions 1-26, the forest management planning requirements, will be incorporated into the Forest Management Planning Manual (FMPM) by June 2004 (see the ECO review of MNR's public consultation process for the manual in the Supplement on pages 149-156). The details of the forest management planning process and the phase-in of the planning requirements will be set out in the FMPM.

Conditions 27-55 of the Declaration Order cover public advisory committees, inspections, audits, reporting, negotiations with Aboriginal peoples, review of guides, scientific research and technical development and administration of the approval. These conditions came into force immediately, unless other deadlines are specified.

Background

The Timber Class EA Approval was issued in 1994 by the Environmental Assessment Board (now the Environmental Review Tribunal), after a four and a half-year public hearing. According to MNR, "the Decision of the Environmental Assessment Board in 1994, with its legally binding Terms and Conditions was the single most important direction ever given to forest management in Ontario." The Ontario Professional Foresters Association has said that the 1994 Decision "set the stage for public involvement in forest resource management, aboriginal consultation, set standards for forest management planning and harvest practices and set silvicultural research goals. It gave rise one year later to new and cutting edge legislation and regulations in forestry that put Ontario firmly on a course of sustainable forest management … The EA gave rise to a decade of rapid policy change and an improvement of practice."

The Environmental Assessment Board included a process for reviewing and possibly extending the approval at the end of the nine-year approval, noting that:

> Our approval is given only if MNR complies with a long and detailed set of conditions, many of which were negotiated by the parties to the hearing…When our approval lapses in the year 2003, the minister of the Environment and Energy will face the decision to extend or change it. Its temporary term means our approval will be tested in the forest.

In its proposals to revise the Class EA, MNR described changes in the legislative and policy context since 1994. MOE agreed with MNR's position. The ministries described landmark events that had "overtaken" the EA Board's decisions. For example, they said, the *CFSA, 1994* and its regulated manuals provide a more rigorous regime than did the former *Crown Timber Act* and the manuals in place when the 1994 EA was approved. They also noted that the *EBR* was enacted in 1994 and so public consultation practices are much improved.

Other forces also caused significant changes during the term of the approval. Cuts to MNR's forest management budget resulted in a new business relationship with the forest industry. MNR's 1996 Forest Management Business Plan transferred responsibility to the forest industry for most of the forest management work prescribed in the Class EA. An MNR-industry Forest Management Transition Team was struck to find cost-savings, and recommended streamlining the forest management planning process. One of their recommendations was to extend the forest management planning cycle from 5 to10 years.

MNR and the industry brought this proposal forward in negotiations between MNR, the forest industry and a coalition of environmental groups, who signed the Ontario Forest Accord in 1999. MNR then initiated a Forest Management Planning Improvement Project and began preparing its proposals for changing the Class EA. MNR said that generally, practitioners and participants found the planning process to be lengthy, complicated and expensive, and suggested a 10-year planning cycle provides a more reasonable timeframe for a re-examination of forest management objectives and a meaningful assessment of changes in the forest resulting from forest management activities. "MNR considers the proposed approach an appropriate balance between planning effort and maintenance of requirements that ensure proper forest management and effective public involvement."

MNR carried out the eight-year review of the Timber Class EA as required in 2001 and 2002 and submitted it to MOE in July 2002. MNR's recommended revisions recast the EA terms and conditions as "enabling planning direction" with the detailed technical forest management direction provided by MNR's own FMPM and other manuals and guidelines. This would allow the ministry more flexibility to amend the FMPM from time to time, and to continue with its ongoing project to amalgamate and streamline its existing forest management guides. MNR was also recommending the change from a 5 to a 10-year FMP process, resulting in adjustments to a number of the terms and conditions. MNR also said it was repackaging and consolidating the terms and conditions for clarity and ease of use, recognizing that the detailed, technical planning requirements are addressed in the FMPM. As well, some changes were required to reflect the transfer of responsibilities from MNR to the industry in the late 1990s.

MNR and MOE followed the process set out in the Timber Class EA, but provided additional opportunities for public consultation by using information notices on the Environmental Registry. MNR had requested the Timber Class EA be amended and extended, but MOE decided that it was going to effect the approval through an Order issued under s. 3.2 of the *EAA*. The Declaration Order declares that the undertaking is exempt from the requirement to prepare an environmental assessment, subject to the terms and conditions.

Substantive Changes
The new Declaration Order removes most of the detail from the terms and conditions that the 1994 Timber Class EA had imposed. The 115 terms and conditions and 25 appendices of the 1994 Timber Class EA Approval have been replaced with 55 conditions. A number of terms and conditions were deleted, as MNR felt it had delivered those policies, and others were streamlined or combined.

The major changes include:

- Forest Management Plan (FMP) term changed from 5 to 10 years. Long-term management direction such as identifying areas for harvest and renewal operations will be done for a 10-year period with operational matters set out for five years. This major change affects many other elements of the planning process, such as public participation, and the details will be set out in the FMPM.
- Details were removed from the public consultation, inventory, and data requirements for preparing forest management plans, with reference to following the requirements in the FMPM. For example, 13 terms and conditions and 4 appendices related to public consultation were consolidated into a single new term and condition.
- The EA Board's restrictions on clearcut size were removed and replaced with the direction to follow MNR's current guide, as revised from time to time.
- "Implementation manuals," now called "forest management guides" are no longer listed in the EA approval but a condition sets out requirements for periodic review, pilot testing and public consultation when the guides are revised or amalgamated.
- The approval has no expiry date, but MNR must prepare a five-year report.

Some products must be developed by June 2004, including:

- A regulation governing the conduct of independent audits
- An action plan describing scientific studies on the effectiveness of the clearcut guide
- A new provincial wood supply policy
- A provincial wildlife monitoring program
- A program for mandatory training and certification of forest operations inspectors
- Management unit reports of forest operations inspections and other information to be posted on MNR's Web site
- A procedure for reviewing and approving water crossings

Implications of the Decision

Less MOE Oversight under the EAA

MOE's role in forest management has been reduced and the public's ability to have forest management activities considered more closely under environmental assessment rules has been lessened. Unlike the 1994 EA Approval, the Declaration Order does not have an expiry date. It requires MNR to prepare a report on the implementation every five years and provide it to MOE and the public, but there is no requirement for MOE to approve it.

Previously the public could request a "bump-up," or an individual environmental assessment, of any specific activities, throughout any stage of preparing a FMP, a major amendment to an FMP or Insect Management Program. In the new 10-year planning cycle, the public will only be provided two 30-day opportunities to request an individual EA. The Declaration Order says that MNR will describe the opportunity for bump-up requests during major amendments to FMPs and insect pest management plans in the FMPM.

Impact of the Decision on EBR Rights

Several stakeholders asked MOE to consider MNR's compliance record when creating the new terms and conditions. A number of past *EBR* applications for investigation have alleged MNR contravened the Timber Class EA approval. In 1999, the ECO reported that it was disappointed with MOE's handling of those investigations. The public may still use the *EBR* investigation process to ask MOE to investigate alleged MNR contraventions of terms and conditions of the Declaration Order, but because most terms and conditions are less prescriptive than in the 1994 Class EA, it will be harder to allege non-compliance. For example, past *EBR* investigations alleged MNR was contravening the EA Board's 1994 conditions restricting clearcut sizes (see I99015 in 1999/2000 and I2002002 in 2002/2003). Because the new Declaration Order conditions only require clearcuts to be planned in accordance with MNR's own forest management guide for determining clearcut size, there is no EA-imposed size restriction which could be investigated for compliance.

The public may still use the *EBR* application process to ask MOE to review the Declaration Order or any element of the decision, although an application submitted within the first five years of the decision would have to be accompanied with new evidence to be considered.

The Declaration Order requires Registry posting for five-year or occasional reviews or amalgamations of MNR's forestry Guides, and for proposals to amend the Declaration Order itself. Many other policies, regulations and other new initiatives flowing out of the Declaration Order will or have already been posted on the Registry as well, such as the Independent Audit regulation, Provincial Wood Supply Strategy and revisions to the FMPM.

Loss of Public Involvement in Forest Management Decisions

Many parties worried that the move to a ten-year forest management planning cycle will erode public involvement in forest management decision-making. The ECO will review the impact of the changes on public consultation in our review of the revisions to the FMPM, where the full details are spelled out, in the 2004/2005 annual report.

Economic Impacts
The Ontario Forest Industries Association commented that some provisions of the Declaration Order will result in increased costs to MNR and industry. The net effect should reduce costs however, as the change from a 5-year to a 10-year planning cycle was proposed by MNR to "provide for a more effective and efficient process, and significantly reduce the planning effort and staff resources required."

Public Participation & *EBR* Process

There were several stages of public participation on MNR's eight-year review preceding the posting of the proposed Declaration Order on the Environmental Registry. For a description of the earlier consultation and information notices on the Registry, see below under "Other Information."

The proposed Declaration Order was posted on the Registry on March 13, 2003 with a 30-day comment period. MOE provided a short description of the process to date, stating that MNR had submitted its review of the Timber Class EA to the Minister of the Environment on July 17, 2002 and also had made it available to the public. The public had been given 90 days to make written submissions to the Minister of the Environment on MNR's review and that MOE had received over 200 submissions from the public, stakeholders and a Government Review Team. MOE would not provide the Government Review Team Report to the ECO, saying it was prepared for MNR. This may reflect the uncertain legal status of this review under the *EAA*, or a lack of transparency in the conduct of the review.

MOE made other documents available when it posted the Registry notice for the proposed Declaration Order. MOE issued a News Release, a 7-page Backgrounder, and a 79-page "Timber Class EA Report" reviewing MNR's implementation of the Timber Class EA Approval and the proposed Declaration Order, which MOE said outlined information that it considered in proposing the new conditions.

Several parties requested an extension of the 30-day comment period and the Environmental Commissioner wrote to the Minister of the Environment to request an extension of the public review period by 30-60 days. MOE's Deputy Minister responded that it was the ministry's view that providing additional time to review the proposed Declaration Order would not identify any new concerns that had not already been properly considered by the ministry, given the extensive consultations that had already taken place over the past two years.

In the Registry decision notice, MOE said that of the 603 comments, 545 were essentially form letters. MOE described the substantive comments and its response under seven headings as described below.

Wood Supply Strategy
MOE said that several commenters recommended it include a clear statement that the provincial wood supply strategy must not lead to production quotas for individual forest management plans. They also asked for reference to the "Room to Grow" policy to share increases in wood supply between the forest industry and new parks. MOE revised the condition to mention the Room to Grow policy framework.

Upper Limit on Clearcut Size
MOE said that some commenters recommended a strict upper limit on clearcut size and a proper area-based measurement for determining the extent of clearcutting in management units. MOE's response in the decision notice did not address the issue directly. MOE simply restated the condition related to clearcuts. MOE said that the conditions require MNR to follow the policy it developed, and that the guide was developed through public consultation. MOE did not make any major change to the rules on clearcut size but did expand the requirements for MNR to study the effectiveness of the clearcut guidelines.

Roadless Area Policy
MOE said that several commenters requested a condition requiring MNR to develop a policy to maintain roadless areas outside of parks and protected areas. MOE defended MNR's position that it met the original condition to develop a policy on roadless wilderness. See the box on page 98 in this annual report and the ECO review of an *EBR* application on this issue on pages 200-205 and 240-246 in the Supplement.

Old Growth Conservation Strategy
MOE said that several commenters recommended MOE include a clear minimum requirement in the old growth strategy for companies to retain natural levels of old growth forests in the managed forest outside of protected areas. MOE did not respond to this request, but stated that MNR had produced the old growth policy required by the original condition. See the ECO review of MNR's old growth policy in the annual report at page 99-104 of the annual report and pages 155-166 of the Supplement.

Aboriginal Consultation
MOE said that several commenters criticized the government for failing in its duty to effectively consult with Aboriginals on the Class EA Review. MOE also said that those commenters criticized that the Aboriginals have not been given an adequate share of the economic benefits of timber management as required by the original term and condition. MOE provided a defence of the terms and conditions of the Declaration Order related to Aboriginal issues.

Planning and Accountability
MOE said that several commenters were concerned with the "watering down" of the Class EA approval leading to a "perceived reduction in public accountability, reduced influence and oversight by the Ministry of the Environment and constrained effectiveness of the *EAA*. In addition, there was concern with the increase to a 10-year forest management planning cycle." MOE stated, "The Declaration Order recognizes the interrelationship between the Class EA, the *CFSA* and the FMPM." MOE said that full regulatory accountability will be maintained through both the *EAA* and *CFSA* and that the changes to the FMPM would be made through an open and transparent public process, with review and approval by Cabinet. Further, MOE said that adding the conditions would improve the FMPM. MOE did not respond at all to the substantial concerns about the change to a 10-year planning cycle.

Expiry Date for the Declaration Order
MOE said that some commenters were critical of the absence of an expiry date for the Declaration Order and suggested a 10-year expiry date with a progress report published in year

five. MOE responded that MOE's current approach is to approve Class EAs without an expiry date, while providing opportunities for periodic review and revisions. MOE stated that instead of an expiry date, the Declaration Order requires annual reports; review and reporting to MOE every five years; opportunities for public input as MNR updates its manuals to include proposed new conditions; and a mechanism available to the public to request amendment of the Class EA. MOE did not make any changes to the Declaration Order in response to these comments.

MOE's Consideration of Comments
MOE did not do a fair job of describing the comments or its responses on the seven issues. In some cases MOE did not directly respond to the actual issue raised, but just repeated the term and condition or MNR's rationale for wanting the change. Many of MOE's responses sidestepped the actual issue.

MOE described only seven issues out of the dozens raised and the ministry did not describe comments received from industry or several other major stakeholders. The Ontario Forest Industry Association and individual companies were in full support of the main elements of the proposal: for example the use of a Declaration Order, moving the detailed technical requirements into the FMPM, and moving to a 10-year FMP. But the industry did raise many technical and policy issues, for example, concerns about the onerous nature of the requirements for road access planning.

This was a major EA initiative with a large number of complex issues, which couldn't all be summarized in a Registry notice. It would have been useful for MOE to publish a summary of comments received and its response to those comments. The 79-page background document that MOE released in March 2003 with the proposal notice also did not acknowledge concerns despite more than 200 comments MOE received on MNR's eight-year review. Other recent Class EA renewals have provided a summary of public comments and a publicly available Government Review.

The ECO reviewed all comments on the Declaration Order provided by MOE. Several commenters praised MOE for improving upon MNR's proposals regarding inspections, independent audits, wildlife population monitoring, wood supply and scientific effectiveness monitoring. The Ontario Forest Industries Association commended MOE for its thorough and thoughtful work. But the message from many other stakeholders was that previous comments to MNR and MOE had not been addressed. These complaints did not come only from environmental groups. For example, Environment Canada, who had submitted comments to MNR in March 2002 and to MOE in June and September 2002, stated:

> We have generally found that most of our earlier comments have not been fully addressed in the Declaration Order, and that adequate obligations do not exist in the Terms and Conditions (Ts&Cs) to address our interests. Quite specific Ts&Cs from the original Class EA Approval have been replaced with ones that are less specific, resulting in removal of much of the requirements for specific commitments, policy development, research, monitoring, and reporting. We are still concerned that this may result in an inability of the Class EA requirements to

> obligate MNR to protect non-timber values, such as migratory birds and their habitats.

A coalition of major environmental groups stated:

> We submitted extensive comments to the MNR on the draft Timber EA Review, and to MOE on the final Timber EA Review. Both submissions proposed alternative wording for the Conditions that we felt needed revision. We have also worked constructively with both the MNR and MOE to attempt to resolve our key concerns. The MOE has made several improvements upon MNR's proposed Conditions, including clearer requirements for monitoring wildlife populations and conducting independent forest audits. However, many of our key concerns have not been addressed.

MOE did strengthen several of the proposed terms and conditions related to monitoring, auditing and reporting in response to public comment, but did not make any of the major changes requested on other issues.

SEV

MOE wrote three paragraphs indicating that the decision was consistent with its SEV principles of environmental protection, the ecosystem approach and resource conservation.

Other Information

The following is a brief chronology of the *EBR* public consultation opportunities leading up to the Registry notice on the Declaration Order:

- December 21, 2001: MNR posted an exception notice PB01E7004 on the Registry with a 60-day comment period – A Paper for Public Review Concerning the Extension and Amendment of the *Environmental Assessment Act* Approval for Forest Management on Crown Lands in Ontario.
- July 17, 2002: MNR posted an update to its exception notice PB01E7004, informing the public that it had submitted its eight-year Timber Class EA Review to MOE. The public was provided a 60-day period to submit comments to MOE.
- September 13, 2002: MNR updated its PB01E7004 notice to inform the public that the Minister of the Environment had decided to extend the public comment period by 30 days to October 16, 2002.
- January 20, 2003: MOE posted XA03E0003, an information notice with no opportunity to comment, indicating that it had extended the Class EA by Declaration Order until July 17, 2003, without amendments.
- March 13, 2003: MOE posted RA03E0004, the proposal notice for this regulation, the Declaration Order, with a 30-day comment period.

ECO Comment

MOE's approval of this Declaration Order significantly weakens MOE's role in forest management and diminishes the public opportunity to scrutinize and hold MNR accountable. It does this by relaxing the terms and conditions, and by removing the requirement for MNR to re-seek approval. MOE has withdrawn from the role it was assigned in 1994 by the EA Board as watchdog over MNR's progress in implementing improvements in forest management. MOE rationalized this by asserting that the *CFSA* and its regulated manuals provide a rigorous framework for protecting forest sustainability, and any future changes to the manuals must be subject to public consultation.

MOE and MNR make a valid point, that the *CFSA* and its regulated manuals set out an accountable regulatory framework for forest management activities. Many of the improvements flowing from the hearing were incorporated into the Act and its manuals. But the claim that "the standards and requirements for forest management are set out directly in the *CFSA* and these four associated manuals" is overstated. The ECO notes that many of these standards and requirements are actually set out in various unregulated guidelines that MNR is currently revising and amalgamating, and whose legal and enforcement status is uncertain. As we report in our review of the Old Growth Policy, MNR is also moving policy direction out of the regulated FMPM and into "notes" and other less binding documents for flexibility.

This decision does change MOE's role in forest management and removes the ability for the public to use the *EAA* to hold MNR accountable. MOE should probably have incorporated additional accountability checks and balances, especially given the concerns about MNR's past compliance. Stakeholders said that MNR's poor compliance record with the existing approval reinforced their concerns about the removal of clear requirements from the EA and the weakening of MOE's role through the indefinite approval period. It is true that MOE's current approach is to approve Class EAs without an expiry date, but the other Class EAs examined by the ECO require the five-year review to be approved by MOE.

Despite MOE's commitment to the ECO in 2001 that it would carry out a third party review of MNR's annual reports to determine MNR's compliance with the terms and conditions of the approval, MOE informed the ECO in 2004 that it did not carry out that review. MOE noted that MNR had "reported difficulty" with the timely preparation of annual reports and the most recent annual report submitted by MNR is for the 2000/2001 fiscal year. Yet MOE did not insert a deadline or timeline for submission of the annual monitoring report, even though it has incorporated deadlines for annual reports in all other recently revised and new Class EAs. The ECO reminds MOE that it is still important for MOE to review MNR's annual reports and monitor MNR's compliance with the approval.

The Ontario Professional Foresters Association (OPFA) was among the many parties who argued that the use of an "everlasting" Declaration Order with no expiry date allows MNR to escape accountability. The OPFA recommended a 10 year fixed term subject to extension after the completion of an independent public review. They noted that the Declaration Order's requirement for a five-year review contains no provision for independent verification, stakeholder challenge or stakeholder response. The OPFA stressed:

> The Association views this lack of an interactive independent public review to be the most serious deficiency in this proposed Declaration Order. The absence of a formal public review process cannot be considered to be in the public interest. An interactive independent public review must be a part of this Declaration Order. It is the most serious credibility issue in this entire process.

The ECO finds this argument particularly persuasive and suggests that MOE propose an amendment to the approval to revise Condition 52 which describes the Five-Year EA Report, to provide for an opportunity for public input and response to the Report and a mechanism for MOE approval of the Report. The ECO also suggests that MOE use a third party to assist with their review of MNR's report.

Many commenters complained that MOE had not addressed their substantive concerns, and MOE did not make major changes to the proposed Declaration Order. This complaint came from government ministries, professional associations, First Nations and individuals. Many of these commenters stated that they had made the same points in submissions to MNR and MOE, and had not seen their concerns addressed. MOE would not provide the Government Review to the ECO, displaying a further lack of transparency.

MOE did respond to some concerns identified by commenters, and restored some detail and rigour to terms and conditions that MNR had proposed to keep very simple. The ECO commends MOE's provisions: strengthening the compliance monitoring and forest operations inspections program; requiring scientific studies of the clearcuts guideline; improving the wildlife monitoring program; requiring a public review of the Independent Forest Audit Process and Protocol. MOE was careful to require action plans and specific implementation schedules for these and other initiatives.

The ECO is pleased that mandatory use of the Registry has been enshrined in several terms and conditions. Several policies, regulations and further studies required by the Declaration Order will be, or have already been, posted on the Registry for public comment. MNR will still post information notices at each stage of public consultation during the development of Forest Management Plans. The ECO will review the impact on public consultation of the change to a 10-year planning cycle.

The ECO has written several other articles related to this decision in the annual report and Supplement to this report. See the annual report and Supplement pieces on MNR's roadless wilderness areas policy, old growth policy, aquatic ecosystem monitoring and forest compliance program.

Review of Posted Decision: Falconbridge: Approval for Sewage Works

Decision Information:

Registry Number: IA03E0209	Comment Period: 30 days
Proposal Posted: February 14, 2003	Number of Comments: 8
Decision Posted: August 14, 2003	Decision Implemented: October 31, 2003

Description

Falconbridge Limited Mines applied for a Certificate of Approval ("C of A") for operations at its Montcalm mine, approximately 70 km northwest of Timmins. Falconbridge plans to extract nickel and copper from this mine. This application was for the construction and operation of a mine water treatment system. This system will treat groundwater pumped for mine dewatering and surface runoff associated with potentially acid generating waste rock stockpiles. The treated effluent will be discharged into the Groundhog River.

Falconbridge proposed two possible routes by which effluent would enter the Groundhog River, a 15 km buried pipeline and an 8 km open ditch. Both routes would transect the proposed boundary of the Groundhog River Provincial Park as laid out by Ontario's Living Legacy (OLL) Land Use Strategy in 1999. However, Falconbridge has the rights to a mining claim that was staked in 1993 where the proposed pipeline would meet the Groundhog River.

The Groundhog River is an ecologically significant waterway. The Ministry of Natural Resources (MNR) is in the process of regulating it under the *Provincial Parks Act* as a waterway class provincial park. This highly diverse site is representative of approximately 22 different landform vegetative combinations, including mixed conifer and mixed deciduous forests. The Groundhog River is also habitat for a population of lake sturgeon (*Acipenser fulvescens*), which MNR has identified as an uncommon or rare species in Ontario that may be susceptible to large-scale disturbances.

MOE granted the C of A. However, the approval is for the pipeline discharge option only as the application to amend MNR's Land Use Strategy, which would allow the potential discharge through the drainage ditch, has not been resolved. In formulating its approval, MOE consulted with MNR in regard to fisheries and water quality concerns. MOE did impose a detailed series of conditions in approving the C of A, including that Falconbridge will monitor the impact of the effluent on the sturgeon population.

Implications of the Decision

As background to this issue, in March 2002, the Ministers of Northern Development and Mines and Natural Resources announced that there will be no new mining exploration on untenured land within the 378 OLL sites. MNR and MNDM subsequently announced that they would begin developing options to address existing mineral tenure on or within the OLL sites, in consultation with the Ontario Prospectors Association (OPA) and the Partnership for Public Lands (PPL).

The OPA and PPL began a series of meetings, with MNR and MNDM providing technical and planning support. The two organizations examined the details associated with 113 OLL sites, resulting in the development of joint recommendations on how to resolve the conflict between mining and conservation lands. In July 2003, the OPA and the PPL submitted their recommendations to MNR and MNDM. Unfortunately, the Groundhog River Provincial Park was one of 19 sites upon which the organizations could not come to agreement. MNR saw its responsibility as developing "creative solutions" for these remaining sites. There are nine pre-existing claims within the boundaries of the Groundhog River Provincial Park as laid out in OLL, including Falconbridge's mining claim that its pipeline would transect.

In February 2002, MNR and MNDM recognized in their internal discussions that a central issue was Falconbridge's access to the Groundhog River, across a waterway park. The staff from both ministries also noted that the Minister of Northern Development and Mines had become active on this issue. In September 2002, MNR's engineering staff stated that "the only waterbody in the vicinity of the proposed mine large enough to hydraulically handle the estimated mine effluent flow is the Groundhog River.... Simply put, if we say no to a direct discharge to the Groundhog, we are likely saying no to the mine."

In December 2002, MNR and MNDM discussed that Falconbridge might have to apply for amendment to the Land Use Strategy for boundary changes to exclude lands for their proposed ditch within the proposed Groundhog River Provincial Park. However, one of MNR's biologists stated that, "both drainage options will pose a risk to the fishery resource under low flow conditions." MNR focused their assessment on lake sturgeon and identified this species as a concern. Based on this assessment, MNR's biologist concluded that, "From an environmental perspective... the pipeline option should not proceed."

In January 2003, MNR advised Falconbridge that there may be some land use planning issues in connection with the construction and operation of the ditch option because of the proposed Groundhog River Provincial Park. Falconbridge was informed by MNR that a portion of the drainage way that lies within 200 m of the shores of the Groundhog River would be within the Groundhog Park and any such construction and operation would need to be considered in the context of Ontario Parks policy and the OLL Land Use Strategy. In subsequent discussions with MNR it was concluded that because of potential time constraints, in addition to the preferred drainage way, an alterative discharge option should also be considered.

MNR told Falconbridge, prior to its application for the C of A, that their mining claim "is not within the proposed boundaries of the Groundhog River Provincial Park." The ministry further stated that "the construction and operation of a buried pipeline via the Claim to convey treated effluent from the Montcalm Site to the Groundhog River is in no way contrary to, or prohibited by, the OLL Land Use Strategy or Ontario Parks Policy." However, MNR's OLL mapping and MNDM's mining claim mapping clearly indicates that the claim in question is within the proposed boundaries of the Groundhog River Provincial Park.

With regard to the impact of effluent, MOE states that "the proposed discharge, after mixing, will be diluted by a factor of a thousand for average flows in the river and a hundred fold for 7Q20 [minimum 7-day, 1-in-20-year] low flow periods. As the effluent must meet the requirements of the O.Reg. 560/94 under the *Environmental Protection Act* which includes non-acute lethality toxicity requirements and because of the dilution afforded by the Groundhog River, it is unlikely that there will be any meaningful adverse effects on the aquatic communities in the receiver. Given the sensitivity of methods currently utilized to detect aquatic effects, as required by the province, it is unlikely that any effects will be measured in the fisheries and benthic invertebrate communities."

The ECO is concerned that MOE's discussion of receiving water impacts of the effluent was made difficult to understand because of several changes of units among ppm, ug/L and mg/L. In some cases, the decision notice had outright errors in numerical values. The ECO has had to interpret numerical values based on consultation of documentation from the Environmental Review Tribunal or other sources.

MOE's objective for copper, based on the Provincial Water Quality Objectives (PWQO), is 5 µg/L. The ministry states that concentrations of copper, the main metal of concern, will be elevated in the Groundhog River by a few µg/L above background concentrations of approximately 3 µg/L. O.Reg. 560/94 has both chemical and toxicity requirements, but the ministry states that the toxicity requirements can be more restrictive than the chemical (metal concentrations) alone. For example, MOE states that many mine effluents would fail the Ontario Regulation 560/94 toxicity requirements at levels of toxicants lower than that permitted in the chemical portion of the Ontario Regulation 560/94 standards. The ministry states that copper is permitted to be discharged at a maximum daily rate of 600 µg/L but the concentration required to pass the toxicity requirement is in many cases less than 300 µg/L and can be lower than 150 µg/L.

MOE states that "there will be a small area where biota may be impacted where the discharge enters the Groundhog River." Mixing models, according to the ministry, show that this area is less than 15 per cent of the river width at maximum and less than 100 m in length where concentrations of copper dilute down to levels of approximately 15 µg/L during low flow periods. According to the ministry, concentrations of copper of 15 µg/L are unlikely to be acutely or chronically toxic to aquatic biota with the pH, hardness, and the dissolved organic carbon characteristics of the receiver. MOE states that other potential metals in the effluent have been evaluated and found to be of less concern than copper.

However, the federal *Fisheries Act* prohibits the discharge of any substance that is deleterious to fish. There is no mixing zone concept under the *Fisheries Act*. As the ECO noted in its 2001/2002 annual report, many activities that are permitted under the *OWRA* allow discharges that could be prosecuted as contraventions of the *Fisheries Act*.

The ministry states that "mercury concentrations in the aquatic biota currently in the Groundhog River may pose a risk to birds and wildlife consuming fish. Discharges from base metal mines frequently lower mercury concentrations in biota in receivers. Hence, increase in mercury in biota are not expected to increase with the effluent discharge from Montcalm mine." However, MOE does not explain how discharges from base metal mines lower mercury concentration in biota. It appears to the ECO that MOE is implying that there are remedial effects of base metal mine discharges, which is a provocative statement that must be substantiated.

Public Participation & *EBR* Process

MOE posted the proposal notice for the C of A on the Environmental Registry for a 30-day comment period on February 14, 2003. Five private citizens and three non-governmental organizations submitted comments on the proposed C of A. MOE provided detailed responses to the concerns raised by the commenters.

A wide-range of concerns was raised with regard to this C of A. These concerns included site water quality management, receiving water impacts, groundwater impacts, monitoring, policy conflicts with the proposed waterway class provincial park, First Nations consultation, the piecemeal approach to such approvals, impacts on wildlife, increased truck traffic in Timmins, the construction of access roads and powerlines, the need for environmental awareness training for employees of the mine, and the past environmental performance of Falconbridge. Interested readers should refer to the notice (IA03E0209) on the Environmental Registry for MOE's comprehensive response to these concerns. Several of the central concerns of the commenters are discussed below.

Concern was expressed that the treated effluent discharge may adversely affect Groundhog River sturgeon population. In response, MOE states that "the effluent evaluation indicated that effects on biotic communities and fish populations in the Groundhog River are unlikely. The small spatial extent of changes in water quality, combined with the limited frequency and duration of predicted maximum concentrations, would reduce the likelihood of sub-lethal effects, however, some uncertainties exist in relation to this prediction which require verification through monitoring."

Commenters also stated that Falconbridge was relying on receiving water dilution to meet Provincial Water Quality Objectives (PWQO) in the Groundhog River and that it should be met at final effluent discharge point. MOE states that there are a number of considerations with respect to treating the effluent to PWQO levels prior to discharge. According to the ministry, "Ontario Regulation 560/94 has effluent limits for the metal mining sector, which reflect the application of cost effective, proven technologies for mine water treatment. PWQOs, on the other hand, are receiving water guidelines, which have been developed to protect aquatic life in natural water bodies. The application of PWQO guideline values to mineral industry final effluents would be inconsistent with the intended and legislative application of Ontario Regulation 560/94 limits and PWQO guideline values."

MOE also states that "the data provided indicate that the mine water treatment system proposed for the Montcalm project would allow PWQO values to be met, or approximately met, in the Groundhog River, for the key parameters, under all flow conditions, with allowance for limited mixing. Moreover, because of the metal-complexing effects of naturally occurring organic acids, there is effectively no meaningful potential for toxic effects to Groundhog River's aquatic life within the mixing zone. O.Reg. 560/94 specifies that final effluents must not be acutely lethal."

Concerns were also raised with regard to the monitoring of water quality and aquatic life in the Groundhog River. MOE states that the C of A specifies a comprehensive receiving water monitoring program to assess the potential for both water quality impacts and impacts to the river's sturgeon population. According to the ministry, the list of water quality parameters is considerably more extensive than that normally referenced in Cs of A, in response to the sensitivity of the receiver. MOE states that "additional monitoring provisions for the treatment system effluent, well beyond those normally required, are included within the C of A to provide the data required for BLM [Biotic Ligand Model] calculations. MOE and MNR, together with the proponent, have also developed a fisheries monitoring strategy for assessing potential effluent discharge impacts on the Groundhog River sturgeon population within the relevant portions of the river."

SEV

MOE does not consider its Statement of Environmental Values (SEV) in approving Cs of A. MOE takes this position on the basis that staff consider its SEV in the development of the legislation that administers instruments. The ministry believes that considering its SEV again for the granting of instruments is not necessary. However, the *OWRA* was enacted in 1961, more than 30 years before MOE's SEV was developed. Moreover, MOE states that its SEV was already considered during the development of its classification regulation for instruments under the *EBR* and, thus, any further consideration is not required.

Other Information

The Partnership for Public Lands, Northwatch and several private citizens submitted leave to appeal applications to the Environmental Review Tribunal based on MOE's decision to grant this C of A. The applicants sought leave to appeal the decision on a number of grounds, including the following:

- The proponent intends to discharge mining effluent through a discharge pipe into the Groundhog River.
- The mining effluent will include contaminants such as copper, arsenic, cadmium, cobalt, lead, nickel, zinc and total ammonia and un-ionized ammonia.
- The land and riverbed encompassing the relevant parts of the Groundhog River have been designated as a Provincial Waterway Park, having excellent sturgeon fisheries and brook trout feeder streams, where mineral exploration and development should not be permitted.
- The Groundhog River contains a provincially significant sturgeon spawning area in the part of the river where the mining effluent would be discharged.
- MNR has identified effluent from the operation as posing a high risk to the Groundhog River fishery. There is a significant risk that the mining effluent may harm the sturgeon, a species ranked globally vulnerable and provincially uncommon to rare.
- MOE is approving the C of A in contravention of its own Provincial Water Quality Objectives according to information provided by MNR and based on MOE's own data.

The Environmental Review Tribunal denied all of the applications for leave to appeal. The Tribunal did not find that the Director was unreasonable in making his decision to approve the construction and operation of a mine water treatment system, nor did the Tribunal find that the decision is likely to cause significant harm to the environment.

The Tribunal recognized that the applicants had raised serious grounds and had genuine concern for the project's potential impact on the environment. However, the Tribunal held that the proponent and the Director had considered these concerns, and that they were reflected in the C of A and its conditions. The Tribunal noted that many of the conditions go beyond normal MOE requirements for mining effluent quality monitoring and standards.

The Tribunal did note Northwatch's concern about the potential for acid generation and concluded that this issue warranted further study and care in implementing procedures to ensure remedial measures are adequate for potential problems. The Tribunal dismissed the applications for leave to appeal by several of the private citizens on the grounds that they did not show the necessary interest in this decision to be granted leave to appeal.

This C of A also is related to a proposal (PB03E2002) on the Environmental Registry by MNR to amend the OLL Land Use Strategy to alter the boundary of the recommended Groundhog River Provincial Park. This boundary change will remove approximately two hectares from one location along the river, and add approximately 22 hectares to the recommended provincial park. The proposed addition is currently being held by Falconbridge Limited as a Mining Claim and is classified as Forest Reserve under the Land Use Strategy. This parcel of land is located along the Six Mile Rapids portion of the Groundhog River, which is considered ideal sturgeon spawning habitat.

The area removed from the park will be re-designated to Crown Land and a disposition will be issued to Falconbridge Limited. The disposition was proposed in order to permit a drainage ditch which would convey treated mine water from Falconbridge's Montcalm mine to the Groundhog River. Falconbridge had proposed as an alternative discharging the treated mine water via a pipeline through their existing claim at Six Mile Rapids to the Groundhog River, which is the subject of the C of A in question.

ECO Comment

The ECO is concerned with the manner in which MOE, MNDM and MNR dealt with the impact of the C of A on the proposed Groundhog River Provincial Park. Each of the ministries followed their standard approvals processes. However, all of the built-in checks and balances did not prevent a result with distressing environmental consequences. Each ministry followed its formal procedures, but this resulted in the approval of mining effluent being piped into a river that was meant to be protected for its natural, wilderness-like qualities. If the Province of Ontario's system of environmental protection fails to actually protect the environment, then the system is failing.

The express purpose of a waterway provincial park is environmental protection. Provincial parks of this type are composed of a watercourse and a contiguous strip of adjacent lands. MNR's internal policy for addressing mining claims that are superimposed on areas meant for protection stipulates that "the implementation of disentanglement decisions will not compromise the 200 metre setback associated with Waterway Class Provincial Parks or, to the extent possible, other buffers established for ecological integrity and design considerations." MNR's internal policy recognized that excluding any of these riparian lands from regulation might seriously impair the ecological function, integrity, and purpose of the very park as a whole.

The ECO wonders how MNR deemed either the pipeline or the ditch options to be compatible with the purpose of the waterway park. MNR saw its responsibility as developing "creative solutions" for withdrawing such claims in order to finish regulating protected areas established by OLL. Clearly, allowing the construction of a pipeline on a pre-existing mining claim or proposing to alter the park boundary to allow an open ditch are not very "creative solutions" that follow the Province of Ontario's commitment to protect the Groundhog River.

MNR should have advised Falconbridge, in their discussions prior to the application for the C of A, that the mining claim in question was within the proposed boundaries of the Groundhog River Provincial Park as laid out in OLL. The ECO believes that MNR also should have asserted this fact to MOE for its consideration of whether or not to issue this C of A. While nothing in OLL or Ontario Parks policy expressly prohibits the development of a pre-existing mining claim, it was clearly MNR's intent to regulate this area as part of the Groundhog River Provincial Park. Regardless, MOE currently has the authority to issue Cs of A in such instances.

Given the uncertainty of the impact and the risk posed to the sturgeon population, MOE's issuance of the C of A runs counter to its own SEV that states that the ministry "will exercise a precautionary approach in its decision-making. Especially when there is uncertainty about the risk presented by particular pollutants or classes of pollutants, the Ministry will exercise caution in favour of the environment." This C of A is a definitive example of why SEVs should be considered in the instrument approvals process. Had MOE followed its SEV commitment of adopting "an ecosystem approach to environmental protection and resource management" in order to actively consider the proposed waterway park in the approvals process, the outcome may have been significantly different.

The ECO concurs with the concerns that were raised about the poor past environmental performance at the Montcalm mine site and the metallurgical site that would process the ore. Past permit exceedances have occurred with respect to ammonia, suspended solids management, and flow-rate at the Montcalm site. However, MOE took no action, but it asserts that the problems were addressed in a timely manner through system modifications. The ECO is concerned that if similar exceedances occur under this C of A, the local sturgeon population will be adversely, perhaps irreparably, affected.

Review of Posted Decision:
Blue Box Program Plan

Decision Information:

Registry Number: RA03E0011	Comment Period: 60 days
Proposal Posted: March 21, 2003	Number of Comments: 90
Decision Posted: December 24, 2003	Decision Implemented: February 1, 2004

Description

One of the most controversial issues in Ontario for the past four years has been waste management. Ever since the Adams Mine controversy re-emerged in the late 1990s, policy makers have focused on how to divert more waste from disposal. One diversion program that was developed in the 1980s is the municipal Blue Box system. However, over the last few years, municipalities have found it increasingly difficult to finance this system. In December 2003, the long-term viability of the Blue Box system was given a boost when the Minister of the Environment approved the Blue Box Program Plan (BBPP), a program under the *Waste Diversion Act* (*WDA*). Blue Box waste is one of nine waste streams that the Ministry of the Environment (MOE) has either designated or plans to designate for the purposes of developing waste diversion programs under the *WDA*. The other waste streams are used oil, scrap tires, organics, electrical components, batteries, fluorescent lighting tubes, pharmaceuticals, and household hazardous waste such as old paint cans. (For further information regarding the *WDA*, please refer to our 2002/2003 annual report.)

Under the BBPP, industry is held accountable for funding 50 per cent of the total net costs of the municipal Blue Box system – approximately $3 million each month in 2004. Industries, primarily retailers, that are obligated under the BBPP are called stewards and will be charged fees for their printed paper and packaging materials that enter the Blue Box system (BBS). The BBPP also describes initiatives to increase the recovery rate for Blue Box waste and to improve the efficiency of the municipal BBS by reducing net costs.

Program Request Letter

On September 23, 2002, MOE requested Waste Diversion Ontario (WDO) to draft the BBPP in conjunction with Stewardship Ontario, the organization that represents stewards, by February 28, 2003. The WDO is an organization authorized by the *WDA* to develop waste diversion programs which promote reduction, reuse and recycling. The WDO was asked to:

- Submit a public consultation plan within one month
- Include material-specific diversion targets and an overall target
- Define stewards as brand owners and first importers into Ontario of products that result in Blue Box wastes
- Define a rule to exempt small companies from the program, i.e., *de minimis* criteria
- Include a method for calculating total net costs incurred by municipalities
- Include a method for calculating payments to municipalities
- Include incentives to improve the efficiency and effectiveness of the BBS.

The WDO was also asked to take into consideration the voluntary contribution of $5 million annually from the LCBO to help cover the cost of recycling glass alcohol beverage containers and other expenses, and the $1.3 million annually from the Canadian Newspaper Association (CNA) and the Ontario Community Newspaper Association (OCNA) as newspaper advertising.

Definitions of Blue Box Waste

In Ontario, there are now two regulations that define Blue Box waste – one is only applicable to municipalities and the other only to stewards.

Municipal Blue Box Systems (BBSs) have been regulated since 1995. O.Reg. 101/94 under the *Environmental Protection Act* (*EPA*) requires that all municipalities with a population of more than 5,000 provide residential recycling. Under O.Reg. 101/94, basic blue box materials are defined as food and beverage containers made from aluminum, steel, polyethylene terephthalate (PET), or glass, and newsprint. Supplemental Blue Box waste includes aluminum foil, fine paper, textiles and magazines. Municipal BBSs are required to collect the basic materials plus at least two supplemental wastes. Although provision s.7(6) in O.Reg. 101/94 requires that BBSs be able to deal with all wastes made of glass, leather, metal, paper, plastic and textiles, this has never been enforced.

On September 23, 2002, the Ontario government passed O.Reg. 273/02 which designated Blue Box waste as the first waste of nine under the *WDA*. This regulation defines Blue Box waste as:

> Waste that consists of any of the following materials, or any combination of them, is prescribed as Blue Box wastes for the purpose of the [Waste Diversion] Act: glass, metal, paper, plastic, textiles.

This regulation only applies to stewards – municipalities will continue to collect Blue Box waste as defined under O.Reg. 101/94. Using O.Reg. 273/02, stewards are required to calculate the tonnage of Blue Box wastes that they generate and could be collected by municipal BBSs. O.Reg. 273/02 includes discarded products such as toys and drinking glasses made of glass, metal, paper, plastic, or textiles, not just packaging. However, since municipal BBSs only collect packaging and printed materials, it was decided that the BBPP would only include these materials. Table 1 below compares O.Reg. 101/94 and O.Reg. 273/02.

Table 1: Comparison of materials defined under O.Reg. 101/94 and O.Reg. 273/02.

O.Reg. 101/94 *EPA*			O.Reg. 273/02 *WDA*
Municipalities must collect Basic Blue Box - all	**Municipalities must collect Supplemental – any 2 materials**	**Municipalities must be capable of handling**	**Stewards**
Newsprint	Boxboard and paperboard Cardboard Fine paper Magazines Paper cups and plates Telephone directories Polycoat paperboard containers[1]	Paper	Paper
PET bottles[1]	Expanded polystyrene containers[1] and packing materials Plastic film Rigid plastic containers[1]	Plastics	Plastics
Glass bottles and jars[1]	-	Glass	Glass
Aluminum and steel cans[1]	Aluminum foil	Metal	Metal
-	Textiles	Textiles	Textiles
-	-	Leather	-

[1] Used for food or beverages.

Stewardship Ontario

In response to the program request letter, WDO established Stewardship Ontario (SO) as the industry funding organization for Blue Box wastes. This was subsequently confirmed by an amendment to O.Reg. 273/02 filed on December 22, 2003. Seven industry associations/sectors are represented on SO: Food and Consumer Products Manufacturers of Canada, Canadian Council of Grocery Distributors, Refreshments of Canada, Retail Council of Canada, Canadian Paint and Coatings Association/Canadian Consumer Specialty Products Association, Liquor Control Board of Ontario, and the Canadian Newspaper Association (CNA).

A draft BBPP was prepared by SO based on input from industry, municipalities and the public and was reviewed by the WDO. In February 2003, the draft BBPP was sent to MOE for approval. MOE then posted it on the Environmental Registry for public notice and comment.

Identification of Stewards

One of the key responsibilities of SO is to identify stewards, i.e., companies that produce or use packaging materials and/or printed papers that are commonly used by residential consumers in Ontario. These companies may be brand owners resident in Ontario that hold or are a licensee of a trademark, such as Sears, Canadian Tire or Loblaws. If the brand owner is not a resident in Ontario, the first importer becomes the steward. Some franchisors may also be stewards. The BBPP also includes the option for a company to become a "voluntary" steward on behalf of brand owners, first importers and franchisors that import and distribute its products into the province. This allows companies that are not resident in Ontario to become stewards. According to WDO officials, the concept of a "voluntary" steward was added to allow national offices of brand owners and first importers to register as stewards instead of their provincial offices.

Small companies which meet the above criteria but have revenues that are less than $2 million, or, if more, have tonnage that is less than a specified amount, are exempt from paying fees. This is called the *de minimis* rule.

Diversion Targets

One of the key expectations of the BBPP is the setting of diversion targets, i.e., the amount of Blue Box waste that will be diverted from landfill into the recycling stream in a year. The BBPP defines diversion in terms of the recycling rate:

$$\frac{\text{tonnage of Blue Box materials in blue boxes that is marketed}}{\text{tonnage of Blue Box materials in blue boxes and in garbage that is or could be marketed}}$$

The BBPP estimates the target diversion rate for 2003 as 45 per cent which is the year-2000 actual diversion rate. The BBPP also describes a second diversion scenario of 50 per cent to be achieved by 2006. The BBPP indicates that targets for each material category collected by the municipal BBS, i.e., targets for printed paper, paper packaging, laminant packaging, plastics, aluminum, steel, and glass, will be developed for 2004-2006.

Calculating 50 per cent of Total Municipal Net Costs

One of the primary objectives of the BBPP is to fund 50 per cent of the total net costs of the municipal BBS through stewardship fees. In order to obtain funding, a municipality must report the tonnage that it marketed for each Blue Box material, its costs of collecting and processing these materials, and its revenues from their sale. According to the WDO, 92.5 per cent of Blue Box material collected by municipalities is marketed. The total municipal (Ontario) cost is calculated by multiplying the average municipal cost per tonne by the total number of tonnes marketed by all reporting municipalities. Revenue for each material is calculated by multiplying the 3-year rolling average revenue per tonne for each material by the tonnage for each material. The total revenue can then be calculated by summing the revenues for each material. Net municipal (Ontario) cost is the difference between the total revenue and the total costs. Fifty per cent of this number is used in the formula for calculating the total stewardship fee.

Eligible municipal costs include collection and processing costs, amortized capital costs, public awareness and education program costs and indirect administrative costs. Municipal revenues include the

Comparing Diversion Rates

Comparing diversion rates can be very confusing. The term is commonly used in three different ways.

a) The BBPP uses it to refer to the amount of Blue Box materials diverted from landfill sites.
b) The Toronto Taskforce 2010 and others use it to refer to the amount of household waste (e.g., Blue Box, leaf & yard waste, organics, etc.) diverted from landfill sites.
c) It can also refer to the amount of total municipal (e.g., household, industrial, commercial and institutional) waste diverted from landfill sites.

In addition, some definitions only include the amount of material recycled; other definitions also include the amount of material reused and/or reduced. Depending on the definition being used, very different diversion rates can be reported.

sale of Blue Box materials, processing fees from material recovery facilities (if they process on behalf of other municipalities), sale of curbside containers, and grants. Under the BBPP, the WDO will oversee the annual collection of municipal data called the 3Rs Datacall. If a municipality reports high per tonne costs in comparison to benchmarks, the WDO may initiate a review of the municipality's system. Random financial audits will also be used to verify municipal data.

Calculating Total Fees Owed by Stewards and Allocating the Fees to Individual Stewards
The total fees owed by stewards include the 50 per cent net cost obligation to municipalities (as calculated above), minus the CNA/OCNA in-kind obligation of $1.3 million and the LCBO annual contribution of $5 million, plus SO costs, program audits, market development programs, enforcement and compliance initiatives, promotion and education. The BBPP does not include the actual formula for calculating stewardship fees but does provide a description. Fees for 2004 are based on 2002 municipal net costs.

The formula for allocating total fees to individual stewards is based on several inputs including the total quantity of Blue Box material generated by all stewards in the province for each material, the quantity of Blue Box material generated by the steward for each material, total municipal net cost for each material and the total stewardship fee. The fee calculation first takes 50 per cent of the municipal net cost for each material. These costs are then apportioned across materials using three factors which are designed to ensure that the material portion of the fee paid by a steward:

- Reflects the actual costs to manage each material
- Takes into consideration the benefits to all stewards from the high recycling rates by some material
- Encourages increased recycling rates
- Reflects that some materials such as aluminum provide revenue.

Table 2 below provides a brief description of each factor and the reason for that factor.

Table 2: Factors used to allocate municipal net costs across materials.

Factor	Description	Reason for the factor
1 – Recovery Rate	Lowers the cost for materials such as newspapers with the highest recycling rates.	A fee based solely on recovery rate would unfairly penalize materials with high recovery rates. Recovery rate = total tonnes marketed of a specific material divided by the total tonnes generated of a specific material.
2 – Net Cost	Lowers the cost for material categories such as aluminum that have a lower net cost to recycle.	This factor penalizes material categories with high costs to recycle. Total net cost to recycle each material = total tonnes marketed of each material * net cost per tonne of each material.
3 - Equalization	Transfers some costs from material categories such as newspapers with high recycling rates to those with lower rates such as laminant packaging.	This factor reflects the cost that would have been incurred if all materials had a diversion rate of 75 per cent.

The other program costs and WDO/SO administrative costs which have also been allocated across each material are then added to the costs calculated above, and the CNA/OCNA and LCBO contributions are subtracted from the newspaper and glass material costs respectively. The resulting costs are then increased by 5 per cent to take into consideration the *de minimis* rule and a further 5 per cent on the assumption that 5 per cent of obligated companies will not register as stewards. The final costs are then restated as a material levy in cents per kilogram. Stewards are required to compute their tonnage of Blue Box materials for each material entering the residential waste stream on an annual basis according to O.Reg. 273/02. The steward's tonnage data for each material is then multiplied by the material levy to obtain the fee owed by the steward for that material.

Allocating Stewardship Fees to Individual Municipalities

The WDO is responsible for the allocation formula, for calculating how much funding each municipality will receive and SO is responsible for distributing the funds. The formula was originally developed by the City of Toronto in anticipation of the *WDA* several years ago. It has since been reviewed and revised by the Association of Municipalities in Ontario with input from SO. The formula does not use individual municipal cost and revenue data to determine a municipality's allocation – it uses provincial averages that are then allocated based on the quantity of Blue Box waste marketed by the municipality. The allocation formula distributes 40 per cent of the funding to municipalities based on weight, i.e., tonnage, and 60 per cent based on volume of the wastes. Therefore more funding is allocated to lighter-weight materials – newspaper and glass are considered heavier-weight materials. Glass volume is increased by one third to compensate for problems related to collection, processing and marketing of glass. The formula also allocates more funding to municipalities with lower population density since their programs are inherently more expensive to operate. Furthermore, since smaller recycling programs are inherently more expensive to operate, a maximum of 10 per cent of their revenue is discounted by the formula. This has the effect of increasing their funding.

Although the objective is to fund 50 per cent of the total net costs of the municipal Blue Box systems, individual municipalities will receive more or less than 50 per cent based on the adjustments identified above.

Table 3: Summary of Blue Box calculations as described in the BBPP. This summary does not list all of the data and calculations that are performed.

	Total municipal net cost (All municipalities)	Total stewardship obligation (All stewards)	Stewardship fee (Individual)	Municipal allocation (Individual)
Input	**For each municipality** • Revenue from sale of Blue Box materials, curbside bins, grants, etc. • Costs including collection, processing, amortized capital costs • Quantity of each Blue Box waste marketed	• Total municipal net cost • SO costs • WDO costs • CNA/OCNA contribution • LCBO contribution • Market development costs • Enforcement costs • Program audits • Promotion and education	• Total stewardship obligation • Adjustment for de minimis and compliance **For each material** • Total quantity of Blue Box generated by all stewards • Municipal material recovery rates **For each steward** • Quantity of Blue Box waste generated by the steward for each material	• Average cost per tonne per material • Rolling 3-year average revenue per tonne per material • Adjustment for glass • Other factors **For each municipality** • Quantity of Blue Box waste marketed per material • Population density • Size of recycling program
Calculation	• Total municipal revenue = rolling 3-year average municipal revenue per material tonne x tonnage marketed by all municipalities + grants etc. • Total municipal cost = average municipal cost per tonne x tonnage marketed by all municipalities • Total municipal net cost = total municipal revenue – total municipal cost	• Total stewardship obligation = 0.50 x total municipal net cost plus 100 per cent of all other costs minus LCBO and CNA/OCNA contributions	Not published in BBPP	Not published in BBPP
Output	Total municipal net cost	Total stewardship obligation	Fee charged to each stewards	Funds paid to each municipality

Market Development

The BBPP includes several market development initiatives to increase diversion rates. During the first year, the priority will be to prepare market development plans for each of the seven material categories and to address issues related to glass. Since marketing of green and coloured glass is considered to have the greatest negative effect on revenues (because glass prices are low and collection costs are high), the BBPP proposes to take action immediately. The "glass action" plan will include: improvement in the quality control and glass handling procedures in major materials recycling facilities, research and demonstration projects using glass as an aggregate, and support for high-value applications. The need for a glass recycling facility and alternative market outlets for recovered glass will also be investigated.

BBPP Cost Containment

According to projections (refer to Table 5), municipal net costs are expected to double within five years under the 50 per cent diversion scenario. To contain these costs, SO included several strategies in the BBPP such as:

- Identifying the true market value of Blue Box materials. SO believes that some municipalities are not receiving true value for the Blue Box materials they market.
- Identifying where excess capacity exists in municipal recycling facilities and working towards eliminating it through amalgamating facilities and other means.
- Developing program benchmarks so that municipalities with higher than average municipal costs can be identified and these municipalities can start to reduce their costs.
- Investigating new technologies to reduce costs and/or increase revenues.

The BBPP also included a commitment to encourage purchasing practices that favour the use of recycled materials and to develop markets for recyclables that are not in demand. At the minister's request, a portion of the stewardship fees will be allocated to the Effectiveness and Efficiency Fund. Municipalities will be able to apply for funds for projects that will reduce municipal net costs and/or increase diversion.

Ministry Requests as part of its Decision

Under the *WDA*, MOE cannot make revisions to a waste diversion program. As a result, MOE could only approve or not approve the BBPP which makes the BBPP and other *WDA* program approvals different than most other decisions posted on the Registry. MOE however can and did ask the WDO to address some of the concerns raised in the submissions received during the public comment period. MOE requested that the WDO submit policies and practices which will lead to at least 60 per cent diversion by 2008 through reduction, reuse or recycling. MOE also asked for target diversion percentages for each Blue Box material category; benchmark diversion targets for municipalities; policies and practices related to municipal cost containment, effectiveness and efficiency; and containment of WDO and SO administrative costs to 5 per cent of total program costs; and a projected schedule of stewardship fees.

Implications of the Decision

The impact of the BBPP on stewards in Ontario is significant from both an economic and a process perspective. In 2004, stewards will contribute $34 million towards municipal Blue Box systems. Stewards must be able to track the amount and type of packaging used in their consumer products sold in Ontario. Packaging which is removed/retained by the steward is exempt. For instance, if you purchase a refrigerator from a department store and the store installs it and takes away the packaging, the store does not have to include this packaging in its tonnage calculation. However, if you purchase a microwave oven and take it home yourself, the store does need to include the packaging in its tonnage calculation whether or not the consumer puts the packaging into the municipal Blue Box waste stream. In addition, SO must be capable of independently verifying a steward's data, e.g., sales, tonnage, etc.

In February 2004, SO published estimated levies for the year 2004, some of which are listed in Table 4. For example, the steward for an advertising flyer would be charged a levy of $3.10 per tonne of flyers distributed in Ontario or three one hundredths of a cent for each flyer. On the other hand, the steward of an aluminum drink can would receive a credit of 0.05 cents for each can.

Table 4: Estimated 2004 levies (cents per unit) for BBPP materials using 2002 recovery rates.

Blue Box Material Type	**2002 Recovery Rate per cent[1]**	**Example**	**Levy $/tonne[1]**	**Levy cents/unit[1]**
Printed Paper	56.0	Daily newspaper – 249 grams	$0.26	¢0.0065
		Flyer – 110 grams	$3.10	¢0.03
Paper Packaging	40.6	Paperboard box – 525 gram cereal	$59.87	¢0.62
		Kraft bag – 4 kg of pet food	$59.87	¢0.49
		2 litre polycoat milk carton	$59.87	¢0.38
Aluminum	39.9	355 ml drink can	($31.93)	¢ (0.05)
Glass	59.1	473 ml juice bottle	$36.82	¢0.84
		750 ml olive oil green bottle	$39.16	¢1.31
Plastics	13.4	2 litre pop bottle (PET)	$96.10	¢0.56
		Outer milk bag	$96.10	¢0.08
		Yogurt cup (no lid)	$96.10	¢0.06
		8 ounce polystyrene coffee cup	$96.10	¢0.08
Steel	48.4	1.36 litre juice can	$43.91	¢0.67
		12 ounce food can	$43.91	¢0.21
All Material Types	46.0	-	-	-

[1] Data was obtained from the Stewardship Ontario Web site.

In May 2004, SO reported that 1,500 companies had registered as stewards and that another 2,000 to 3,000 companies were expected to register. Since it was necessary to determine the amount stewards owed to municipalities in 2004 before the actual total municipal net cost was finalized, it was agreed that stewards would pay $34 million regardless of the actual total net cost. The Canadian Federation of Independent Businesses estimates that 85 per cent of its 40,000 members will be exempt under the *de minimis* rule for sales and additional members will be exempt under the weight threshold.

The BBPP included five-year projections of municipal net costs based on two diversion rates – 45 per cent diversion rate, i.e., *status quo*, and 50 per cent diversion rate. To obtain these projections, a number of variables had to be estimated including tonnages marketed, and municipal revenue and cost data. Some of the projections are summarized in Table 5.

Table 5 – Projections of municipal net cost per tonne, 2001 – 2006[1]

Year	Scenario	Printed Paper Net costs	Packaging Net Costs	Municipal Total Net Costs	Municipal Net Cost Per Tonne[3]	Total Tonnage Diverted
2001	Negotiated[2]	$662,000	$61,838,000	$62,500,000	$89	699,255
2002	Estimated[2]	$5,959,000	$71,470,000	$77,429,000	$109	709,800
2003	45% recovery	$9,677,000	$77,312,000	$86,989,000	$121	720,300
2004	50% recovery	$10,154,000	$98,653,000	$108,807,000	$134	814,700
2005	50% recovery	$14,339,000	$102,319,000	$116,658,000	$141	827,100
2006	50% recovery	$15,005,000	$104,957,000	$119,962,000	$143	839,200

[1] Data was taken from BBPP Tables 6-6 and 7-3.

[2] The municipal 3Rs Datacall which requested data for 2002 was completed after the BBPP was sent to the MOE for approval. The actual total tonnage diverted in 2001 was 693,537 and in 2002 was 725,710.

[3] There is a two year time lag between the time the net costs are incurred by municipalities and the time that stewards are obligated to pay 50 per cent of the net costs.

According to Table 5, there would be a 20 per cent increase in the tonnage of Blue Box waste diverted in 2006 compared to 2001, and municipal net costs would increase 91 per cent and cost per tonne would increase 61 per cent. The actual municipal total net cost for 2002 has been negotiated to be $84 million. Although this number is substantially higher than was projected, SO attributes much of the difference to better quality data.

For municipalities, this injection of cash into a system that has been primarily funded through property taxes for years is welcome. Some municipalities have been cutting back on their BBSs due to major budget constraints. Municipalities are still expected to fund on average 50 per cent of their net costs from property taxes. Northern programs are estimated to receive 20 per cent higher than average per tonne allocation than the provincial average. In order to receive funding, municipalities are required to report costs, revenues and tonnages to the WDO not only for the purpose of calculating the total steward obligation and the amount of that obligation that will be allocated to each municipality, but also for review for reasonableness. Municipalities will also be able to apply to the WDO for funding for projects to improve the effectiveness and efficiency of their programs, and will have additional promotional support provided by the CNA/OCNA contribution.

The formula to allocate funds to municipalities is intended to promote efficiency and to improve diversion rates. Since fees increase as the quantity of Blue Box material produced by stewards increases, there is the potential that stewards will look at ways to decrease their Blue Box material by redesigning their packaging or will switch to a material that they perceive to be more favourable.

Since the BBPP does not directly affect curbside collection, it is unlikely that most Ontarians will notice any change. Blue Box waste will continue to be collected by municipalities according to local priorities. It is unclear what the long-term impact will be.

Public Participation & *EBR* Process

Opportunities for stakeholders, including the public, to comment on the proposed BBPP were provided at two stages. During the initial drafting of the BBPP, Stewardship Ontario (SO) consulted with potential stewards through various means including two advisory committees, two sub-committees, workshops, webcasts and direct contact and provided additional notice through press releases and Web site information. The Association of Municipalities in Ontario (AMO) obtained feedback from municipalities using consultation sessions. At the same time, the Recycling Council of Ontario organized several sessions and other means to obtain input from the public. After the BBPP was sent to the MOE for approval, it was posted on the Environmental Registry for 60 days for public notice and comment and MOE received 90 submissions.

Summary of Comments Raised by Potential Stewards

Two concerns in particular were raised by industry regarding the drafting of the BBPP: lack of adequate consultation on the draft BBPP and time to review and comment. Some small and medium-sized enterprises have expressed concern that they were not adequately involved in the process.

One contentious issue has been regarding the concept of a "voluntary" steward which was not included in the program request letter nor in the early versions of the BBPP. Material suppliers such as glass and packaging suppliers are worried that they will be pressured by brand owners and first importers to pay stewardship fees.

Industry has raised numerous concerns including: the fee calculations are complex and formulae changed frequently during the initial consultation period; it isn't always clear whether the brand owner or supplier is responsible for fees related to in-store and food service packaging; and the formula for allocating costs across Blue Box materials is unfair. Some stewards expressed concerns that were premised on a misunderstanding that the formulae proposed by SO are based on weight. Industry had a mixed reaction to the *de minimis* rule. Some thought that the *de minimis* rule violated the principle of a level-playing field; others thought that more companies should be exempt and that the BBPP will have a negative effect on small and medium-sized enterprises. Industry suggested that either municipalities should share the costs or that the government should absorb the costs of non-compliant stewards. Some industry spokespeople have questioned why funds are being allocated to investigate the need for a glass recycling facility since existing facilities are under-utilized.

Some industry representatives noted that a weight-based levy creates a bias against heavy packaging such as steel, glass and paper, and that the BBPP encourages contamination of recyclable materials. They noted that in the past, material neutrality was achieved using the "basket of goods" approach which treats all packaging identically. Others preferred an "activity based costing" approach. One of industry's concerns is that the proposed levies actually discourage recycling of some materials since the more that is recovered, the more industry is required to pay. A number of companies also raised the concern that if MOE approved the BBPP it would legitimize the proposed levy formula and would facilitate its propagation across the country as other provinces are considering changes to their recycling programs.

Industry was particularly concerned with the overall projected costs of the program since it has no direct control over municipal costs. In particular, industry was concerned about inefficient municipal programs, excessive profits of private waste management contracts, and significant WDO and SO overhead costs.

Summary of Comments Raised by Municipalities

AMO arranged six consultation sessions and a teleconference with municipalities across Ontario. Municipalities were supportive of the proposed BBPP and urged MOE to approve it as soon as possible. Eastern and northern Ontario and rural municipalities expressed concern that net cost estimates were substantially below their actual net costs.

Some municipalities were also concerned about how the funds from the Effectiveness and Efficiency Fund would be allocated – would all the funds go to large municipalities and would there be enough projects requiring funding? Would the funds be better spent on public education and awareness? Some municipalities suggested that O.Reg. 101/94 be revised such that boxboard, fine paper, magazines, high-density PET bottles, etc., be moved from the Supplemental to the Basic collection list and possibly be banned from disposal, and that coloured glass be delisted. Municipalities also questioned the value of the CNA/OCNA (newspaper associations) in-kind contribution since they have found newspaper advertising to be ineffective in changing recycling habits.

Other Comments

The Recycling Council of Ontario (RCO) used open houses, workshops and various other formats to obtain input on specific elements of the program from the general public. The public had a further opportunity to provide input when the proposed BBPP was posted on the Environmental Registry. The Canadian Environmental Law Association (CELA) noted that the BBPP did not include diversion targets for most years as required by the minister, MOE, and that it did not provide sufficient incentive for brand owners to choose highly recyclable packaging nor are the reporting requirements sufficient to verify that diversion targets are being met. In its submission, RCO noted that the BBPP did not include any direct initiatives to reduce or reuse Blue Box wastes and is very disappointed that the diversion target is only 50 per cent. RCO is also concerned that stewards may switch to lighter-weight packaging despite it being generally less recyclable in order to reduce their fees, and that stewards are not being encouraged to use recycled content. Another commentor believes that companies using recyclable materials will switch to disposable packaging and, in some cases, may even move their operations out of Ontario.

MOE Response to Comments

In response to ongoing concerns from stakeholders on several issues, MOE held two Round Table Stakeholder meetings to allow further discussion. According to MOE, the most pressing issue is the long-term containment of municipal Blue Box system costs. As a result MOE has asked the WDO to prepare a cost containment strategy. It is MOE's view that most concerns can be resolved by the WDO through its ongoing program implementation and operation function. In response to concerns that the diversion rate target should be increased, MOE has asked the WDO for policies and practices which will lead to at least 60 per cent diversion of all Blue Box wastes by 2008 up from 50 per cent.

SEV

In a briefing note, MOE advised the ECO that it considered several aspects of its SEV when it decided to approve the BBPP. MOE noted that the BBPP encourages resource recycling and environmental protection by diverting waste from the landfill stream back into the manufacturing stream, thereby reducing our dependence on non-waste resources and reducing the potential for negative environmental impacts from landfilling and pollution from the manufacturing process. In addition, approval of the BBPP takes into consideration not only the environmental impacts, but also the social and economic impacts. The BBPP supports the development of green industries in Ontario through research activities and promotes education of the consumer about the 3Rs – reduce, reuse and recycle. The ECO agrees with MOE's evaluation that diversion of Blue Box material has the environmental benefits noted above but has a number of concerns that are outlined below (see ECO Comment) about whether or not the BBPP fulfills these promises.

Other Information

In 2000, the average Toronto household produced one tonne of garbage, of which 73 per cent was landfilled. The remaining 27 per cent was diverted by municipal programs such as Blue Box system, and leaf and yard waste pickup. With the closure of the Keele Valley landfill site, Toronto and some other municipalities began shipping all of their non-recycled waste to Michigan. The Toronto Waste Diversion Taskforce 2010 has proposed that all household garbage be recycled, reused or composted and has set the following diversion targets: 30 per cent of household waste by 2003, 60 per cent by 2006 and 100 per cent by 2010. On February 5, 2004, the City of Toronto announced that it had diverted 32 per cent of its household waste in 2003 surpassing its target by 2 per cent.

For more than a decade, MOE provided about one third of the operating and capital costs of municipal Blue Box systems. However, in recent years, property owners have directly shouldered nearly all of the collection and processing costs of Blue Box materials through property taxes whether or not they purchased the products. Table 6 (below) lists the 2002 gross costs per tonne for 10 municipalities. There are substantial differences in the numbers, reflecting the diversity of BBSs in the province. Differences in types of material collected, amount collected, population density and amount spent on promotion affect the gross cost. According to data provided to the WDO by municipalities, the 2002 municipal net costs per tonne ranged from $7 to $4,908 for an average net cost of $136 per tonne, and the tonnage marketed by municipalities ranged from 3 tonnes for the year to 137,818 tonnes.

Table 6: Municipal gross costs per tonne for 10 Ontario municipalities.

Municipality	2002 costs per tonne				Gross cost per tonne
	Collection	Processing	Depot/transfer	Promotion & education	
Durham Region	$136	$45	$4	$7	$193
Hamilton, City of	$141	$81	$1	$7	$238
Kenora, City of	$210	$372	$74	$15	$671
Kingston, City of	$174	$132	$0	$0	$306
Peterborough, City of	$140	$87	$0	$4	$231
Stratford, City of	$174	$0	$6	$1	$181
Timmins, City of	$132	$0	$0	$4	$135
Thunder Bay, City of	$51	$31	$10	$2	$94
Toronto, City of	$153	$34	$15	$3	$205
Westport, Village of	$205	$269	$165	$0	$640

Source: Data for each municipality was taken from the Waste Diversion Ontario Web site – 2002 Financial Datacall.

Waste diversion program plans are currently being drafted for used oil and scrap tires and are expected to be finalized in 2004. Additional information regarding these programs can be found on the WDO Web site and on the Environmental Registry.

ECO Comment

In our 1998 annual report, the ECO recommended that MOE promote product stewardship requiring industry to take increased responsibility for the management of the wastes associated with their products and by introducing mandatory waste reduction, reuse and recycling targets. With this decision, MOE has taken some modest steps towards implementing product stewardship for Blue Box materials and has fundamentally changed how diversion of these materials is funded. Until now, only a few companies in Ontario took direct responsibility for the environmental, social or economic impact of wastes from the consumption of their products. A notable example has been the Beer Store which takes back all of its consumer packaging and reuses its bottles numerous times. As a result, the Beer Store is exempted as a steward under the BBPP.

The BBPP is clearly the result of considerable effort by all participants and was completed in a very short period of time. However, it is apparent that stewards in particular continue to have many concerns – many of which were raised during the initial consultation period – and some were outlined in letters sent to the ECO. The ECO appreciates that MOE chose to meet with stakeholders directly to discuss their concerns after the comment period for the proposed BBPP on the Environmental Registry closed.

As previously noted, the BBPP has three primary objectives:

- To fund 50 per cent of the total net costs of the municipal BBS by fees charged to stewards.
- To increase the diversion rate for Blue Box materials.

- To improve the efficiency of the municipal BBS.

It is clear that the BBPP has met this first objective even though some stakeholder concerns have yet to be fully addressed by MOE, SO and the WDO. However, it will take time to determine whether the other two objectives are being met.

Increasing the Diversion Rate

The BBPP described two diversion "targets" – 45 per cent which is the *status quo* for 2002 and 50 per cent which is a modest improvement for 2004-2006. The latter in fact was presented as a scenario with no clear commitment to achieve. The BBPP notes that during consultation there was little municipal support for setting aggressive diversion targets. The ECO is disappointed that the BBPP adds further expense to the Blue Box System without a clear commitment to improve the diversion rate. In addition, material-specific diversion targets were not included in the BBPP despite being requested by the Minister of the Environment. It is important that material-specific diversion targets are defined to ensure that packaging trends move in the direction that results in less packaging going to landfill.

One of the primary objectives of the *WDA* is to "promote the reduction, reuse and recycling of waste." However, the municipal Blue Box system has always focused on encouraging householders to recycle – reduction and reuse initiatives have not been part of the system nor are they directly targeted in the BBPP. Despite significant reductions being made in the amount of packaging in the 1990s, many Ontarians still believe that products are over-packaged and would like to see more progress in this regard. Reuse initiatives have been limited. The ECO is encouraged that the Minister of the Environment has asked the WDO to consider reduction and reuse initiatives as a means to achieve 60 per cent diversion by 2008. However, the BBPP definition for diversion rate does not consider the amount of material that is reused and reduced and would require revision to accurately reflect these initiatives.

Although the BBPP recognizes the need to improve the diversion rate through commitments to education and market development, details were not available. Without clearly defined programs, it is unrealistic to expect the diversion rate to improve significantly during the five years of the BBPP. Furthermore, a couple of these commitments, i.e., the $1.3 million in-kind contribution of the CNA/OCNA to provide newspaper advertising and the commitment to investigate the need for a glass recycling facility have been subject to some criticism which is troubling and further underlies our concern about market development. Hopefully, the minister's decision will spur development of viable programs.

With the implementation of O.Reg. 273/02, Ontario has two definitions for Blue Box waste – one for municipalities and one for stewards. Stewards have asked why they are paying fees for recyclable materials that municipalities don't have to collect. Others have suggested that O.Reg. 101/94 be modified to include more materials to bring it in-line with O.Reg. 273/02. This would have the potential of diverting more waste from landfill without necessarily requiring additional facilities to be built. The ECO agrees that a review of O.Reg. 101/94 is warranted and urges MOE to consider this option as a possible way to increase diversion rates.

Improving the Efficiency

One of the most contentious issues for industry has been SO's projection that municipal net costs would increase by 91 per cent within five years. There are only three ways that municipal net costs can be reduced – reduce gross costs, increase revenues or a combination of the two. The BBPP appears to be more focused on cost containment than revenue generation. Although the ECO agrees with the minister that further work is required on cost containment, revenue generation should also be an integral part of the solution.

Some industry representatives and CELA are concerned that the levies encourage stewards to change packaging materials to those that result in the lowest stewardship fee. They have warned that some stewards may switch to plastics which would decrease the diversion rate and increase net costs. According to the BBPP, the levies were intended to encourage the opposite. The ECO urges MOE to closely monitor changes in packaging to ensure that the stated objectives are achieved. Furthermore, if such changes occur, they may be very difficult to reverse.

Transparency

Another contentious issue for industry has been the lack of transparency regarding the calculation of stewardship fees. The BBPP includes a detailed description of the formula, but the actual formula has not been made available. Although industry is allowed to view the formula under SO's supervision, this approach is impractical for the estimated several thousand stewards and further undermines trust in a process that has already been found to be faulty according to some industry representatives. The ECO urges MOE to require the WDO and SO to make the formula public so that it can be independently verified for integrity and fairness.

Although the draft BBPP was readily available to the public and some of the consultation sessions have been open to the public, the BBPP is a long and complex document that is not easily understood. Some guidance material has been prepared to assist stewards but very little of the available material is suitable for the general public. The ECO believes that some plain language material should be developed to assist the public in understanding this program and to help inform their decisions on further proposals regarding this program.

Conclusion

The BBPP does achieve its objective of having industry fund 50 per cent of municipal Blue Box net costs but considerable work remains to be done if significant improvements are to be achieved in diversion rates, and in the effectiveness and efficiency of the Blue Box System. Furthermore, the BBPP has been developed without the benefit of an overall waste management strategy. The *WDA* provides a framework for developing waste management programs for specific wastes but this piecemeal approach to program development means that large sectors of the economy, such as the industrial, commercial and institutional sectors, are not necessarily caught up in the *WDA* net. Moreover, it is unclear if these programs are being developed in a holistic way, with an understanding of the whole waste management picture in Ontario. The ECO believes that some of the concerns of stewards would be addressed if they were assured that generators of waste that go to landfill or incineration would also be required to pay for the costs of managing their wastes. This could be further supported by enacting legislation under s. 88 of the *Environmental Protection Act* prohibiting the use or sale of certain types of packaging, and of products that pose waste management problems.

The Minister of the Environment has recognized that significant concerns remain outstanding with the BBPP and has requested that they be addressed. The ECO urges MOE to post changes to the BBPP on the Environmental Registry for public notice and comment. The BBPP is a significant change for municipalities and stewards that requires time to understand and implement. And as its full implications become apparent, the primary stakeholders must be prepared to modify the program to ensure that the original objectives are being achieved and to build public and industry confidence.

Review of Posted Decision: Ban on the Land Application of Untreated Portable Toilet Waste

Decision Information:

Registry Number: RA03E0016	Comment Period: 30 days
Proposal Posted: April 25, 2003	Number of Comments: 7
Decision Posted: September 22, 2003	Came into Force: October 30, 2003

Description

On October 30, 2003, the Ministry of the Environment (MOE) took further action to protect Ontario's drinking water supply by banning land application of untreated portable toilet waste, commonly called septage. MOE also established standards for land application of treated portable toilet waste. These changes are described in O.Reg. 326/03 which amends R.R.O. 1990, Regulation 347 – General Waste Management of the *Environmental Protection Act* (*EPA*).

Septage is defined as waste from a septic system tank, holding tank or portable toilet. MOE estimates that Ontario residents produce about 1.2 million cubic metres of septage or 280 million gallons per year. Untreated septage refers to septage that has not been stabilized, for instance by treatment with lime. O.Reg. 326/03 only applies to septage from portable toilets such as those commonly found at outdoor events, road construction sites and remote workplaces, and thus applies to only a small portion of the septage produced in Ontario. According to MOE, untreated portable toilet waste is being phased out first since it may contain chemicals, such as deodorizers, that are harmful to the environment, and foreign objects such as plastics.

This is the first regulation to be implemented under the province's "Proposed Strategy for the Five-year Phase-out of the Land Application of Untreated Septage." MOE has indicated that regulations to phase out spreading of untreated septage from all sources including holding tanks and septic system tanks onto land will be developed.

In 1998, MOE amended Regulation 347 to require companies that haul, store and dispose of sewage to obtain a Certificate of Approval. Haulers were allowed to continue to use their existing disposal sites if the sites met several conditions such as setbacks from water wells and surface water. Approved septage disposal sites in Ontario included waste stabilization lagoons, approved septage land application sites, municipal sewage treatment plants, and waste disposal sites approved to receive septage, such as landfill sites. MOE has relied on conditions added to Certificates of Approval to prevent winter spreading of septage.

With the enactment of O.Reg. 326/03 in 2003, portable toilet waste can be deposited at the following sites:

- A sewage works, including lagoons, approved to receive sanitary or hauled sewage.
- A waste disposal site approved for temporary storage of hauled sewage.
- A waste disposal site approved as a temporary site for drying the waste.
- A landfill site approved as a final disposal site.
- A site approved to treat the waste to meet the following requirements:
  i. Is within the allowable concentration for *E. coli* and regulated metals.
  ii. Has a pH that is not less than 6.0.

iii. Has no more than 0.5 per cent dry weight of plastic objects and no more than 2 per cent dry weight of other non-biodegradable objects.

- An organic soil conditioning site, i.e., a farmer's field, if the site has been approved by MOE to receive portable toilet waste that has been treated to meet the requirements described above.

O.Reg. 326/03 replaces the amendments to O.Reg. 347 made in 1998 for portable toilet waste only – other types of septage are still regulated according to the rules set in 1998. O.Reg. 326/03 does not require that a specific type of treatment be used – only that the treated portable toilet waste meet specific requirements.

Implications of the Decision

This regulation directly affects portable toilet waste haulers and may affect waste treatment and waste disposal site operators. Portable toilet waste haulers that were land applying untreated waste will now have to find alternative means of disposing of this material and probably incur increased costs. This may be challenging in some parts of Ontario where appropriate sites may not be available or may need upgrading and additional approvals. There is a risk that some haulers will cease operations or dump illegally. Septage haulers that were land applying treated portable toilet waste will now be required to have an Organic Soil Conditioning Site Certificate of Approval and will need to meet quality standards that are consistent with the existing standards for sewage biosolids.

Waste treatment plants are designed to process domestic sewage waste which is more dilute and may have different processing requirements than septage. As a result, waste treatment plants that accept significant amounts of septage may need to alter their procedures to appropriately treat septage which is more concentrated. Although this regulation only applies to portable toilets, some municipal waste treatment plants, particularly those in largely rural municipalities, may not have the capacity to accept the increase in septage according to MOE. Some municipalities may decide to impose limits on the amount of septic waste that they will accept.

Since land-applied septage is defined as a nutrient under the *Nutrient Management Act* (*NMA*), agricultural operations that accept septage as a nutrient must also comply with regulations enacted under the *NMA*.

Public Participation & *EBR* Process

MOE held numerous public consultation meetings across the province on the *NMA* Stage 2 Regulatory Initiatives between December 2002 and February 2003. During this time the public had the opportunity to raise issues regarding *NMA* initiatives including the Proposed Strategy for Five-year Phase-out of Land Application of Untreated Septage. The ministry also posted the proposal on the Environmental Registry and continued to meet with the stakeholders during the four months following the Registry posting.

MOE received seven comments on the Registry proposal notice. The respondents were from the municipal sector, portable waste hauling industry and the environmental community. In general, the proposal was well received, with all respondents recognizing its environmental significance.

In general, industry respondents were concerned with the proposed July 31st, 2003, implementation date which meant that the program would start in the middle of their busiest season. There was also a concern with the potential lack of facilities to treat the waste. One industry respondent was concerned about the inability to access the appropriate information to make an informed comment on the proposal and what the proposal would mean for the company's operation.

Although the environmental community was supportive of the initiative, the Canadian Environmental Law Association and the Sierra Legal Defence Fund made a joint submission noting several concerns regarding Organic Soil Conditioning Sites Certificates of Approval and the lack of a clear definition for "treated" portable toilet waste in the proposed regulation.

Based on the comments provided, MOE amended the proposal in three ways. First, MOE changed the implementation date of the ban to October 30, 2003, to avoid implementing during the height of the summer season. Second, MOE included additional disposal options. Third, MOE changed the regulation to require that those who apply treated portable waste to land obtain a Certificate of Approval for an Organic Soil Conditioning Site. In its decision notice, MOE summarized the comments and explained how the proposal was amended. In addition, it clarified that untreated portable toilet waste could still be accepted at treatment lagoons approved to accept hauled sewage under the *Ontario Water Resources Act*.

SEV

In its SEV statement, MOE acknowledged its commitment to environmental protection and to an ecosystem approach. The regulation was seen by the ministry as an important means of minimizing the release of pollutants into the natural environment. The regulation was also perceived to be consistent with an ecosystem approach by the ministry as it would promote greater consideration of the interrelationship between the environment, the economy and society. The ECO agrees with MOE's assessment.

Other Information

In November 2002, the ECO received an application for review requesting MOE to consider the need for a new regulation under the *EPA* regarding septage disposal. The applicants were concerned that, if a ban on the application of septage to land was implemented, illegal dumping would occur and health and environmental issues would arise. MOE denied the review on the basis that a septage management strategy was already being developed.

Other provincial initiatives have also recognized the need to better manage septage. Under the Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem, 2002, Ontario committed to developing a nutrient management policy framework and a monitoring program to control land application of septage. The Advisory Committee on Watershed-based Source Protection Planning recognized that septage may threaten the quality of source and groundwater and recommended that areas where septage is spread be given special consideration. Elsewhere in Canada, five provinces have banned the application of untreated human waste on farmland.

One of the first inspection sweeps conducted by MOE's SWAT team, a mobile inspection and enforcement unit, targeted septic waste haulers in early 2001. Numerous infractions were identified and all 38 haulers that were inspected were ordered to meet provincial environmental legislation. A subsequent inspection sweep in 2002 of septage haulers found that only 12 companies met the conditions of their Certificates of Approval, and eight of 68 inspections resulted in a failing grade.

The regulation of septage in Ontario is complex. Currently, septic systems are regulated under the *Building Code Act* which is administered by the Ministry of Muncipal Affairs and Housing. Septage haulers and land application of septage are regulated under the *EPA* which is administered by MOE. Land application of septage is also regulated under the *NMA*, which is administered by OMAF and MOE jointly, and is currently being phased in.

ECO Comment

The ECO agrees that there is a need to strengthen the legislation regarding septage in Ontario and supports the ban on spreading untreated portable toilet septage on land. This ban is long overdue. In our 2000/2001 annual report, we noted that there is no requirement to reduce pathogens in untreated septage before spreading it on land; nor is there a requirement for any benefit to soil and crops. We also noted that there was no requirement for septage haulers to maintain adequate storage for times when spreading is inappropriate. Despite posing greater risk to the environment, septage spreading rules were weaker than those for biosolids. The ECO believes that this amendment to O.Reg. 347 is a first step to strengthening septage legislation and to improving consistency with current practices for the treatment and handling of municipal sewage and biosolids. The ECO also believes that ensuring compliance with this regulation is critical to protecting surface and groundwater.

Although extensive comment opportunities were provided to the public, combining this proposal with the Stage 2 Regulatory Initiatives under the *Nutrient Management Act* (*NMA*) during the regional meetings may have resulted in numerous and contentious *NMA* issues overshadowing septage issues. Therefore, the ECO is pleased that MOE met with stakeholders directly to discuss their concerns.

Most septage haulers are small businesses that may be challenged to find appropriate disposal methods. MOE delayed the implementation of this regulation until after the busy summer season giving haulers more time to make the necessary changes to their operations. In addition, some municipal sewage treatment plants may need to alter their procedures. Despite the delay in implementation, the ECO is concerned that some haulers may have been unable to find appropriate disposal sites and may dump illegally or cease operations. As of May 2004, MOE is still working on developing a management strategy for the bulk of the septage produced in Ontario. Until MOE clarifies how the new rules will work and what the responsibilities of various parties will be, both municipalities and industry will be reluctant to invest in new infrastructure to treat septage.

The ECO is also concerned that the government is creating a patchwork of legislation regarding sewage, septage and biosolids that is becoming increasingly difficult to track and to comply with due to its complexity and fragmented nature. Regulations to support the *Safe Drinking Water Act* and *NMA*, and to amend the *EPA* have recently been enacted and more regulations are planned. In addition, we have yet to see legislation to support watershed-based source protection planning.

Furthermore, some regulations are being phased-in over several years adding to the confusion about who and what is being regulated and what the applicable rules are. The ECO urges the government to take every opportunity to ensure that the public and the stakeholders have a clear understanding of how the legislation affects them and of what they are expected to do.

MINISTRY OF NATURAL RESOURCES

Review of Posted Decision: Amendment to Bracebridge District Land Use Guidelines: Permitted uses of Crown Land in the Kimball Lake Area

Decision Information:

Registry Number: PB8E3025	Comment Period: 90 days
Proposal Posted: December 15, 1998	Number of Comments: 63
Decision Posted: May 12, 2003	

Description

The Ministry of Natural Resources (MNR) approved the Bracebridge District Land Use Guidelines (DLUG) in 1983, establishing the direction on the permitted uses of Crown land within the former Bracebridge District. This area is now part of MNR's Parry Sound District.

MNR identified Area D (Special Study Area – Parks) among the General Resource Areas established in the DLUG. This area is located in Livingstone Township, Haliburton County, northeast of Kawagama Lake, and includes the Crown land around Kimball Lake. The area is approximately 17.6 square kilometres in size and is near the southwestern boundary of Algonquin Provincial Park. The Special Study Area was established as a location that might contain life science features of significance to the provincial parks program.

The DLUG established interim management guidelines for this area, which were to be applied until it was determined if the area contained features of significance to the provincial parks program. These interim guidelines prohibited the extraction of aggregates, the harvesting of timber, the construction of new access roads, and any further disposition of Crown rights. An exception was made for mineral exploration, which was permitted to occur under controlled conditions.

The purpose of MNR's 1998 proposal was to investigate a variety of options for restricting resource extraction uses and road access in this area. These options included continuing with the level of current restrictions or permitting controlled timber harvesting and aggregate extraction, while maintaining restrictions on public access.

According to MNR, this area has been modified only slightly from a natural condition. No major forest fires have occurred in recent history and no logging has been done since the early 1800s. Consequently, most of the original sugar maple forest remains, although white pine has been removed. Fifty-seven per cent of the forested land is dominated by sugar maple stands ranging from 70 to 150 years old. Large sugar maple, yellow birch, hemlock, white pine, and white birch are scattered throughout the area. A black spruce-sphagnum bog occurs in the southeast section of the area. This area was also identified and maintained by MNR as a winter range for deer.

Four studies were undertaken on the ministry's behalf between 1978 and 1991 to document the area's biotic and abiotic features. MNR states that these studies concluded that the Special Study Area contains life science features of local or regional significance, but not of provincial significance. MNR states that the studies also concluded that the features in the subject area were better represented in Algonquin Park. Based on the judgements of these studies, MNR developed this proposal in 1998 to remove the Special Study Area designation. These studies were not available through hypertext links in the proposal notice on the Environmental Registry.

MNR proposed to amend the provisions for this area set out in the DLUG by removing the "Area D – Special Study Area – *Parks*" designation in the *Bracebridge District Land Use Guidelines*, replacing it with the designation of Multiple Resource Management. MNR did recognize that the area contains important values related to remoteness, but also noted that the forest industry has identified its interest in carrying out forest management activities in the area, including timber harvesting under controlled circumstances.

MNR states that the amendment complies with the land use policies established by Ontario's Living Legacy Land Use Plan in 1999. As a result of this decision, the majority of the subject area has been designated as a remote access Enhanced Management Area (EMA), known as the Livingstone Township EMA.

Implications of the Decision

MNR states that a benefit of removing the Special Study Area designation is that it would reinstate to the land base an area available for forestry use. The forest industry has identified this area as containing high quality forest resources. The ministry asserts that reinstating the area would meet the intent of Item 21 in the 1999 Ontario Forest Accord, which states that MNR will work with the forest industry and the Partnership for Public Lands to reinstate to the land base any deferred park, study and protected areas that are not selected in their negotiations.

The intent of the Livingstone Township EMA is to maintain the remote access characteristics of the area, while also managing for its high quality forest resources and its high quality backcountry recreational opportunities. The remote character will be retained through planning and establishing standards for the location. Comprehensive road planning for the Livingstone EMA is to occur through the forest management planning process. Roads for industrial and commercial use are permitted. However, the ministry states that they will be closed to public use and their standards should be lower than those governing primary access roads. New roads must be planned through comprehensive long-term access planning that considers the values of the area.

Forest management activities must comply with the policies and principles of the French-Severn Forest Management Plan, which necessitates applying provincial forest management practices and special Area of Concern prescriptions where appropriate. The forest management planning process will provide opportunities for the public to express their concerns regarding forestry in the subject area.

The French-Severn Forest is managed under a Sustainable Forestry Licence by Westwind Forest Stewardship Inc., a not-for-profit, community-based forest management company. Westwind does not harvest wood itself, but provides silvicultural support, compliance assistance, planning services, and information management resources to approximately thirty logging companies that hold overlapping licence agreements with Westwind. All of the managed Crown land forests in the Parry Sound District, except Baxter Township, is governed by the French/Severn Forest Management Plan. The anticipated dates the plan will be in effect are for the twenty-year period from April 1, 2004 to March 31, 2024, and with respect to forest operations, for the five-year term of April 1, 2004 to March 31, 2009.

The notice for the forest management plan was originally posted on the Environmental Registry on May 15, 2002, at the Invitation to Participate stage (PB02E3002). It was re-published August 5, 2003, at the Draft Plan Review stage. It was then re-published February 6, 2004, at the Public Inspection of Approved Plan stage.

Public Participation & *EBR* Process

The proposal notice was first published on the Environmental Registry on December 15, 1998 with a 90-day public consultation period. An advertisement was also placed in two local newspapers and mailed to 154 nearby landowners, as well as to other individuals and organizations with a potential interest in the area. The Registry notice was then re-published in March 2001 and January 2002 up-dating the status of the proposal.

MNR received 63 comments as a result of its proposal notice. Three comments expressed full support for the amendment, while all others expressed concerns or were in opposition to MNR's proposal. Some of the main concerns raised in the comments were that:

- The site studies were inadequate in their determination of the significance of area.
- Logging would destroy the remote character of the area.
- Increased public access would occur as a result of new logging roads.
- Logging would have significant impacts on fish populations, wildlife habitat, water quality and old growth stands.
- The area should be protected as a buffer to Algonquin Provincial Park.
- Ministry staff would be unable to properly monitor compliance with forestry guidelines and regulations.

In response to these concerns, MNR held an information session in September 2002 to: discuss the proposal to remove the Special Study Area designation; discuss proposed mitigation measures for forest management; determine if there were any new issues that were not previously raised that the ministry should be aware of; and, provide an optional field trip to view and discuss forest management and access in the vicinity. The field trip was held in the Livingstone EMA, north of the Special Study Area, where logging had recently taken place. Approximately 40 people attended both the information session and the field trip. Notice of the information session was provided in three local newspapers, and mailed to nearby landowners and individuals who had responded to the original notice. The public was given approximately 30 days to submit written comments. Three written comments were submitted, which did not identify any new concerns.

The majority of concerns expressed by the public were in relation to the impacts that forestry could have on the area. MNR states that most of the concerns of the public can be mitigated through the access limitations of the remote access EMA designation, as well as through the Forest Management Planning process.

MNR also met with the forest industry and the Federation of Ontario Naturalists in August 2002, pursuant to its obligations under the Ontario Forest Accord. MNR states that the consensus of this meeting was that the ministry should proceed with the proposal to remove the Special Study Area.

SEV

MNR states that it reviewed its Statement of Environmental Values (SEV) in formulating its final decision. The ministry states that "a precautionary approach is applied in the FMP, which makes use of the current guidelines for protection of values. These guidelines allow for the consideration of the incomplete nature of our information and the philosophy of adaptive management. New information, whether it is the identification of site specific values or new science and technology, will be adopted as the plan evolves."

Other Information

This ministry decision is related to an application for review under the *EBR* submitted to MNR and MOE by the Sierra Legal Defense Fund on behalf of the Wildlands League (see pages 200-204 and 240-246 in the Supplement). These organizations submitted their report *The Road Less Travelled?* that describes concerns about the impacts of logging roads and, in particular, the increased access they provide for other uses such as motorized hunting and fishing. The report reveals high levels of access control violations of the Timber Management Class Environmental Assessment. The applicants requested a review of all existing laws, policies, regulations and instruments addressing the building of logging roads and the planning of logging road networks, access control issues and the preservation of roadless wilderness areas. They also requested the ministries review the need for new laws, policies, regulations and instruments to incorporate into Ontario's forestry management practices. This application for review was denied by both MNR and MOE.

ECO Comment

The main issue in the District Land Use Guidelines was whether the area contained ecological features and functions that warranted its designation as a protected area. Four studies were completed which, according to MNR, all concluded that the area did not contain significance to the provincial parks program. MNR states that it supports the recommendations of these studies, as they all come to a similar conclusion and were completed by qualified experts. However, as noted by several commenters, the studies vary significantly in their comprehensiveness and conclusions.

The most comprehensive of the four studies, a 30-page report documenting a four-day field investigation, was completed in 1978 by MNR staff. This study concludes that "the Kawagama-Kimball study area has many qualities and elements which cannot be matched elsewhere in the Algonquin Region except in the interior of Algonquin Provincial Park. The scenery is spectacular and the forests are magnificent. The area would make an excellent provincial park. It may also be considered for a 'canoe-in' wilderness park or for an addition to Algonquin Provincial Park." This study identified numerous regionally significant ecological features that warranted protection and further study.

The second study was completed in 1983 by MNR staff. This study appears to be a one-page summary of the previous MNR study. It concludes that "if this holding is deemed necessary as a park the landform/vegetative associations occurring here would augment existing representations provided by other holdings, e.g. Algonquin Park."

The third study was completed in 1991 by a consultant on behalf of MNR. This study contains only a one-sentence reference to the Kawagama-Kimball area, making no conclusions as to its significance to the provincial parks program. The fourth study is a one-page letter by the same consultant describing his one-day visit to the area. In contrast to the original study done by MNR staff that described the forest as not having been logged in over two hundred years, the consultant describes the area's forest as "reflecting intensive logging impact in the not too distant past… the relatively heavy past disturbance to the forest cover and apparent absence of unusual communities and associations reduces its representational significance considerably." The consultant concludes that the area appears to offer little to the provincial life science framework, but only a detailed inventory could confirm this definitively. However, the consultant then states that such a detailed inventory is unnecessary.

The ECO is concerned with the quality of scientific information on which MNR has based this decision and the manner in which it has been presented to the public by the ministry. The ministry states in its decision notice that all of the studies concluded that the area was not worth designating as a protected area. That is clearly not the case. Further, the one study that actually expressed that it was not a suitable candidate area for protection was simply a one-page letter describing a one-day site visit. The only study that provided any detail on the site – and recommended its protection – was 25 years old when the ministry posted its decision notice on the Environmental Registry. This same study also recommended additional biological inventories of specific features on the site, which apparently did not occur.

MNR's Statement of Environmental Values commits the ministry to being "a focal point for the establishment of information standards and the provision of data, information and knowledge about the geography of Ontario's landmass and its natural resources, and for reporting on the status of resources in Ontario." MNR's SEV also recognizes that, "Our understanding of the way the natural world works – and how our actions affect it – is often incomplete. This means that we exercise caution, and special concern for natural values in the face of such uncertainty, and respect the 'precautionary principle'." These commitments under the *EBR* do not appear to have been fulfilled.

Review of Posted Decision:
Land Use Planning for the Kawartha Highlands Signature Site

Decision Information:

Registry Number: PB00E3003	Comment Periods: 148, 45, 38 and 37 days
Proposal Posted: October 3, 2000	Number of Comments: 621
Decision Posted: June 20, 2003	

Description

The Kawartha Highlands Signature Site (KHSS) is one of nine Signature Sites that was identified in the July 1999 Ontario's Living Legacy (OLL) Land Use Plan. These areas exemplify Ontario's natural heritage and were identified as warranting special planning strategies. Located 50 kilometres north of Peterborough along the southern edge of the Canadian Snield, the KHSS is a relatively undeveloped area encompassing more than 35,000 hectares. It features a rugged landscape of small lakes, wetlands, forests, and rocky barrens.

The province committed to making the KHSS the largest protected area south of Algonquin Provincial Park. In July 2000, the Minister of Natural Resources established a 12-member local stakeholder committee to make recommendations on guidelines for land use, the appropriate protection designation, and possible boundary refinements. The stakeholder committee would carry out public consultation prior to making these recommendations, but it would be consistent with the policy direction provided by OLL, as below:

- The Kawartha Highlands Signature Site will receive protection by being designated either a provincial park or conservation reserve, or a combination of the two categories
- The designation will apply only to Crown land
- The designation of the KHSS under appropriate legislation will be completed prior to December 2003
- Traditional recreational activities will continue in the final designation, including, but not limited to, canoeing, angling, hunting, hiking and snowmobiling
- Commercial forestry or hydroelectric development will not be permitted in the KHSS.

The overall goal for the committee was to develop recommendations so that the ministry could "protect the natural and recreational values" of the Kawartha Highlands. The committee recognized that local involvement was essential to the planning process. In order to develop a common vision for the Kawartha Highlands, the committee organized a comprehensive system of public consultation to gain an understanding of current issues and concerns. The committee's public consultation measures included direct mailings, newspaper advertisements and articles, workshops and open houses, a Web site, and the use of the Environmental Registry. MNR provided support staff to assist the committee in its numerous tasks.

The stakeholder committee undertook an extensive public consultation process to develop its recommendations, presenting its final report to the Minister of Natural Resources in November 2001. Most notably, the committee recommended that the KHSS be regulated as a provincial park in addition to the introduction of specific legislation to enshrine planned activities and management policies.

On December 12, 2002, the Minister of Natural Resources introduced Bill 239, the *Recreation Reserve Act*, for first reading in the legislature with the intent to address the KHSS. The *Recreation Reserve Act* evoked strong opinions from key stakeholders as it reflected few of the stakeholder committee's recommendations and failed to contain any significant provisions for environmental protection. Most notably, Bill 239 proposed to designate the KHSS as a "recreation reserve" rather than as a provincial park. On March 12, 2003, the Ontario government prorogued the legislature and all Bills on the Order Paper, including the proposed *Recreation Reserve Act*, ceased to exist.

On June 17, 2003, the Premier then introduced Bill 100, the *Kawartha Highlands Signature Site Park Act*, for first reading in the legislature. Given third reading two days later, this Act establishes the primacy of protecting the ecological integrity of the park, while allowing most traditional non-industrial activities to continue. It also establishes a Management Advisory Board that will have a significant role in management planning and implementation. This Act is based substantially on the recommendations originally provided to the minister by the stakeholder committee in November 2001, including the regulation of the KHSS as a provincial park.

On June 20, 2003, MNR posted its decision on the Environmental Registry with regard to the recommendations of the stakeholder committee. In light of its highly criticized first attempt at introducing legislation with regard to the KHSS, MNR stated that the land use direction for the Kawartha Highlands Signature Site would be as a provincial park as recommended by the stakeholder committee. Additionally, the ministry accepted the majority of the committee's other recommendations on boundaries, permitted activities, and the stewardship management model.

Implications of the Decision

See Other Information and the ECO Comment below.

Public Participation & *EBR* Process

Stage One of Public Consultation

Stage One of the committee's public consultation centered on a series of open houses beginning in September 2000. Approximately 400 people attended these events, including 57 presentations that were made to the committee. A notice was posted on the Environmental Registry allowing for a 148-day comment period beginning on October 3, 2000.

The committee received approximately 175 written submissions during this phase of the public input process. A wide spectrum of submissions were received including, but not limited to: the protection of the natural heritage features, the maintenance of the semi-wilderness quality of the area, the opposition to certain land-use designations, the impact of motorized recreation vehicles, the siting of boundaries, the carrying capacity of the area, the appropriate levels of human access to the area, the provision of emergency services, private property concerns of local residents and cottagers, the status of hunting camps located on-site, the uncertainty of future public funding, the lack of trust in government, and the nature of the future promotion of the site.

Stage Two of Public Consultation
Stage Two of the committee's public consultation began with the presentation of a draft recommendations report in August 2001. The committee distributed more than 5,000 copies of their report. A notice was posted on the Environmental Registry on August 14, 2001 to advise the public of new information as well as to allow a 31-day comment period for this phase of the consultation. The notice was republished on September 11, 2001 for an additional 14 days to accommodate public requests for an extension of the comment period.

The stakeholder committee recommended in its draft report that KHSS be a "made in Kawarthas" operating provincial park with an interim management statement developed and implemented immediately. It also recommended that adequate funding to support park management and planning be provided, and a co-stewardship management model with equal decision-making powers with MNR officials. Further, the committee suggested specific boundaries and zoning for the site, in addition to comprehensively detailing appropriate allowable recreational activities.

This phase of public consultation resulted in 225 written submissions to the committee. Additionally, 250 people attended an open house and 17 presentations were made to the committee. The comments received during this phase of public consultation reflected those generated during the first phase. Several individuals expressed concern to the ECO that the background material provided on the stakeholder committee's Web site was not consistent with the information found in the Environmental Registry proposal notice. Some of the stakeholders also expressed concern that notice of the extension of the comment period was not posted on the stakeholder committee's Web site.

Stage Three of Public Consultation
The stakeholder committee submitted its final recommendations report to the minister in November 2001, beginning Stage Three of public consultation. This report incorporated prior public input and provided greater detail on the committee's recommendations. Following the committee's initial terms of reference and its draft recommendations, the committee recommended that MNR regulate KHSS as a provincial park under the *Provincial Parks Act*. The committee further recommended that MNR introduce new legislation to further protect the area beyond that of the *Provincial Parks Act*, such as by means of a "Kawartha Highlands Provincial Parks Act."

The committee made 24 recommendations with regard to allowable recreational and commercial activities. The final report recommended allowing most of the traditional uses of the area to continue, with certain restrictions based on permits and zoning. For example, the committee recommended that snowmobiling continue to be allowed on pre-existing authorized trail systems, but that no new trails would be created. The continuation of sport hunting within the KHSS was also recommended, including giving existing hunting camps enhanced tenure. The committee also recommended that the recreational use of motorized all-terrain vehicles not be allowed in the KHSS.

A notice was posted on the Environmental Registry on July 15, 2002 for 38 days to provide new information and opportunities to participate in the third phase of consultation. This notice was republished on July 26, 2002 to provide clarification on specific wording of the proposal. The notice was then republished on September 24, 2002 for 37 days to provide an opportunity for the public to comment on the committee's recommendations report. Due to time-delays in forwarding submissions between offices, MNR accepted all public comments up to November 26, 2002.

The final recommendations report received a total of 621 comments. MNR only considered the comments from this third and final phase of public consultation in making its decision. Thirty-one submissions were made on behalf of organizations, associations, municipalities, boards and the Ministry of Northern Development and Mines. A number of submissions complimented the stakeholder committee for its inclusive, balanced, and transparent process of developing its recommendations. In contrast, other individuals said that the process was dictatorial, secretive, and undemocratic.

The majority of comments expressed support for the recommendations, including broad support for the designation of KHSS as a regulated provincial park. Among those organizations supporting the committee's recommendations were the Partnership for Public Lands, the Canadian Parks and Wilderness Society, several cottager associations, and the Town of Bancroft. Supporters of the recommendations stated that regulating the KHSS as a provincial park would increase social, economic, and environmental benefits to the area, notably through the promotion of sustainable tourism opportunities in tandem with the protection of the area's natural features and functions.

A minority of submissions objected to the designation of the KHSS under the *Provincial Parks Act*, including several cottager associations, the Township of Carlow/Mayo, and the Ontario Federation of Anglers and Hunters. Other objections to the committee's recommendations centered on private property issues, public access, changes to hunting and trapping in the area, and an apprehension of increased visitor usage of the area. Several individuals also expressed concern over the committee's public consultation process and its use of the Environmental Registry.

SEV

MNR states that it reviewed its Statement of Environmental Values (SEV) in formulating its final decision. The ECO agrees that this decision is consistent with many of the principles and values contained in the ministry's SEV and the purposes of the *EBR*.

Other Information

Recreation Reserve Act (Bill 239)

In December 2002, the Minister of Natural Resources introduced Bill 239, the *Recreation Reserve Act*, for first reading in the legislature with the intent to address issues surrounding the KHSS. The Minister of Natural Resources stated that "the proposed legislation will address concerns brought forward by the local stakeholders during the recent public consultation process to determine appropriate protection for the Kawartha Highlands."

The proposed *Recreation Reserve Act* evoked strong opinions from key stakeholders as it reflected few of the stakeholder committee's recommendations. Most notably, Bill 239 proposed to regulate the KHSS as a new land use class, a recreation reserve, rather than as a provincial park under the authority of the *Provincial Parks Act*. Despite its deficiencies (see below), the *Provincial Parks Act* is the primary legal mechanism for protected areas in Ontario.

The intent of Bill 239 was to designate the KHSS as a recreation reserve "for the purpose of ensuring that the lands are used solely for recreational and non-industrial commercial purposes." Hunting, fishing, boating, and snowmobiling were to be permissible activities, including commercial activities such as fur harvesting and guided hunting. The proposed legislation did not contain any specific measures to actively protect the area's natural features and functions, nor did it require any management planning process for the site.

MNR posted a proposal notice for Bill 239 on the Environmental Registry for a 45-day comment period. The Sierra Legal Defense Fund, on behalf of the Partnership for Public Lands, twice requested that the comment period be extended. The Sierra Legal Defense Fund sought this extension in order to allow sufficient time for it to receive documents from MNR under an information request under the *Freedom of Information and Protection of Privacy Act*. The ministry denied both of Sierra Legal Defense Fund's requests to extend the comment period.

MNR received 3,765 public comments, the majority of which were form letters supporting Bill 239. Organizations supporting the designation of the KHSS as a recreation reserve included the Ontario Federation of Anglers and Hunters, the Ontario Federation of Snowmobile Clubs, the Ontario Fur Managers Federation, and the Northern Ontario Sportsmen's Alliance.

Almost all the submissions that were received which opposed the proposed *Recreation Reserve Act* expressed concern that the recommendations of the stakeholder committee had been completely ignored. Among those organizations opposed to Bill 239 were the Sierra Legal Defense Fund, the Canadian Parks and Wilderness Society, the Ontario Waterpower Association, World Wildlife Fund Canada, and the Federation of Ontario Naturalists. Several of these organizations also commented that Bill 239 was in direct conflict with pre-existing MNR policies including Ontario's Living Legacy, the Ontario Forest Accord, and the Room to Grow framework.

The Partnership for Public Lands also commented that MNR was at odds with previous recommendations made by the Environmental Commissioner of Ontario. In our 2001/2002 annual report, the ECO recommended that MNR "create a new legislative framework for provincial parks and protected areas, including conservation reserves, with the mandate of conserving biodiversity." The groups represented by the Partnership for Public Lands stated that Bill 239 led the ministry in the exact opposite direction.

On March 12, 2003, the Ontario government prorogued the legislature and all bills on the Order Paper, including the proposed *Recreation Reserve Act*, ceased to exist.

Kawartha Highlands Signature Site Park Act (Bill 100)

On March 18, 2003, Premier Eves announced that MPP Chris Hodgson, the former Minister of Natural Resources, would work to reach consensus on appropriate levels of protection and traditional use for this area. As MNR observed later, "It was clear, from the public comments received in response to the *EBR* posting for the *Recreation Reserve Act* and the debate which continued after the comment period ended, that further discussion was required to find a broadly acceptable solution for the Kawartha Highlands Signature Site."

Closed-door consultations were then held with members from the Partnership for Public Lands, the Ontario Federation of Anglers and Hunters, and the original stakeholder committee. The result was the development of a Charter for the KHSS. Its purpose was to:

- Document the general agreement amongst a range of stakeholder groups in the Kawartha Highlands Signature Site area on how best to protect and manage the area for future generations
- Develop a strategy for implementing the protection and management policies
- Provide interim direction for the management of the recommended park until such time as the area can be protected under legislation and a management plan is approved.

The Charter formed the basis of Bill 100, the *Kawartha Highlands Signature Site Park Act*, introduced for first reading in the legislature by the Premier on June 17, 2003. Given third reading two days later, this Act establishes the primacy of protecting the ecological integrity of the park. It also ensures the continuation of traditional non-industrial activities, provides greater private property assurances and establishes a management advisory board that will have a substantial role in management planning and implementation. The Act has received Royal Assent, but, as of June 2004, has not been proclaimed.

On June 20, 2003, an exception notice forgoing further public consultation was posted on the Environmental Registry for Bill 100. MNR stated equivalent consultation occurred during the development of the stakeholder committee's draft recommendations for the KHSS, on their final recommendations, and on Bill 239. In reference to the closed-door consultations it undertook, MNR stated that further work to develop this legislation with stakeholder participation was undertaken from March to May 2003.

The purpose of the Act is to ensure that "the protection of the ecological integrity of the Kawartha Highlands Signature Site Park is recognized as the overriding priority in the management and administration of the Park, so as to preserve, protect and enhance the natural composition and abundance of native species, biological communities and ecological processes in the Park." This provision in the Act is noteworthy as the KHSS is now the only provincial park with a legal mandate to conserve ecological integrity. Akin to biodiversity, ecological integrity is understood as the condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes.

The *Kawartha Highlands Signature Site Park Act* allows for hunting, trapping, and fishing to continue. The Act specifically prohibits prospecting, staking mining claims, developing mineral interests, commercial forestry and commercial electric power development. The Act also forbids the construction of any new roads within the park boundaries, with the exception of the possible construction of two new roads intended for visitor usage.

The Act formally establishes a management advisory board, responsible for the preparation of the management plan for the park. The management advisory board, representing a broad cross-section of stakeholder interests, was appointed in August 2003. The *Kawartha Highlands Signature Site Park Act* unequivocally requires the preparation of a management plan for the park, within one year of the Act coming into force. This provision is significant as the Minister of Natural Resources under the authority of the *Provincial Parks Act* has the discretionary power to determine whether or not to create management plans for provincial parks. The overwhelming majority of provincial parks in Ontario do not have a management plan in place.

On January 23, 2004, MNR posted an exception notice on the Environmental Registry stating its intent to regulate the boundaries of the KHSS under the *Provincial Parks Act*. MNR undertook a consultation process at this stage – lasting approximately on month – to consult with potentially affected stakeholders on the refinement of the boundaries. Local potentially affected stakeholders such as adjacent landowners, resource users, municipalities and interest groups received direct written notice in the form of a newsletter from the management advisory board. Public notices were also placed in local newspapers during this period.

ECO Comment

The ECO commends the local stakeholder committee for its perseverance and commitment to develop recommendations for the protection of the Kawartha Highlands Signature Site. The committee undertook an extensive public consultation process into a high profile issue that raised many heated opinions on how this area should be managed. The committee was required to address how to best protect the natural environment of the site, yet also determine what recreational and commercial activities should be allowed.

The committee recommended to the Minister of Natural Resources that the KHSS be regulated as a provincial park, as well as introducing "made in the Kawarthas" legislation to exceed the limited provisions for protection found in the *Provincial Parks Act*. Instead, the Minister of Natural Resources initially chose not to follow these recommendations by introducing the *Recreation Reserve Act*. This proposed legislation would have made the area a recreation reserve "for the purpose of ensuring that the lands are used solely for recreational and non-industrial commercial purposes." The *Recreation Reserve Act* failed to contain any significant provisions for environmental protection.

The introduction of the *Recreation Reserve Act* jeopardized a long process of public involvement and participation guided by the stakeholder committee. This proposed legislation was also contrary to the direction laid out by MNR's own policies. Ontario's Living Legacy, itself the result of several years of consultation and over 40,000 public submissions, established that the KHSS was to be regulated as either a provincial park or a conservation reserve.

In contrast, the *Kawartha Highlands Signature Site Park Act* represents a positive step forward for Ontario's system of protected areas. The KHSS is now the first – and only – provincial park in Ontario in which ecological integrity is the legal priority. It is also now the only provincial park that is unequivocally required to have a management plan. Unfortunately, the legislation is limited to only this particular protected area.

The ECO believes that the *Kawartha Highlands Signature Site Park Act* illustrates the larger legislative and policy problems with Ontario's system of protected areas. MNR was required to pass such additional legislation due to the fact that the *Provincial Parks Act* is grievously outdated, having undergone little revision since its introduction 50 years ago.

A total of eight provincial parks existed when the current version of the *Provincial Parks Act* was passed in 1954. There have been dramatic improvements in our understanding of the ecological sciences and the role of protected areas since that time. The *Provincial Parks Act*, and its underlying policies, do not reflect these realities. With the exception of the KHSS, Ontario's provincial parks currently have no legal mandate to conserve ecological integrity or biodiversity. This antiquated Act now regulates 291 provincial parks.

In its 2001/2002 annual report, the ECO recommended that MNR "create a new legislative framework for provincial parks and protected areas, including conservation reserves, with the mandate of conserving biodiversity." In response, MNR admitted the need to revise the *Provincial Parks Act* but it considered the implementation of Ontario's Living Legacy a higher priority.

The *Kawartha Highlands Signature Site Park Act* demonstrates that revising the legislation governing protected areas and creating new protected areas are not mutually exclusive. The stakeholder committee's recommendations and the ministry's ensuing actions show that the two issues are inextricably related. The KHSS is the first of nine signature sites to be finalized. Unless the legislation guiding all of Ontario's protected areas is revised, the ECO speculates that MNR will face the same obstacles with the eight other signature sites and all future provincial parks. In passing the very first *Provincial Parks Act* in 1913, the legislature learned then that it was inefficient to pass legislation on a park-by-park basis. Now more than ever, the ECO believes that a single piece of legislation with a long-term ecological vision and explicit planning requirements is needed for Ontario's system of protected areas.

Review of Posted Decision:
MNR's Process for Amending the Forest Management Planning Manual

Decision Information:

Registry Number: RB02E7001	Comment Period: 30
Proposal Posted: July 9, 2002	Number of Comments: 4
Decision Posted: January 29, 2004	Came into Force: Filed December 8, 2003

Description
This regulation sets out how the public will be able to review and comment on amendments to the Forest Management Planning Manual (FMPM). In essence, MNR has consulted on a consultation process.

The FMPM is a very important document that provides direction for all aspects of forest management planning on Crown lands in Ontario. It sets out rules for MNR and the forest industry under the *Crown Forest Sustainability Act* (*CFSA*) and the *Environmental Assessment Act* (*EAA*). This roughly 500-page technical document contains the detailed requirements for planning and implementing forest management activities on Crown lands in Ontario. The requirements include road access, timber harvest, forest renewal, tending (use of herbicides) and protection (use of insecticides) treatments. The FMPM also includes detailed instructions for conducting public consultation, monitoring, evaluating forest sustainability and reporting. The consultation process for the current revision of the FMPM is of high interest among people who follow Ontario forestry issues because many detailed rules have been removed from the ministry's environmental assessment approval, to be spelled out instead in the revised FMPM.

The FMPM is one of four manuals approved by regulation under the *CFSA*. The *CFSA* states that "an amendment to the Forest Management Planning Manual shall be subject to review and comment by the public in accordance with the regulations," so MNR was required to prepare this regulation before it could make any amendments to the FMPM. The regulation reviewed here (O.Reg. 428/03) amended O.Reg. 167/95 (the general regulation) under the *CFSA*. The regulation sets out a public consultation process only and does not make any changes to the manual itself.

The New Consultation Process
The process for public consultation set out in the regulation builds on the public consultation requirements of the *EBR*. Where the minister is considering proposed amendments to the FMPM which would have a significant effect on the environment, the minister shall post a proposal notice on the Environmental Registry and also provide written notice to:

- Persons who have indicated to the ministry in writing that they are interested in providing comments on the next revision of the FMPM
- Persons to whom, in the minister's opinion, an opportunity to provide comments should be given
- The Director of the Environmental Assessment Branch of MOE.

The written notice will include details about how to obtain further information about the process, information about the Registry posting and the deadline for providing comments. After comments have been received, the minister may, if he or she intends to make changes to the process proposed in the notice, post an updated notice on the Registry and provide a copy to the persons referred to above.

For amendments that the minister considers would not have a significant effect on the environment, the minister will not post a notice on the Registry, but may provide written notice as described above.

Background
The original FMPM incorporated the detailed terms and conditions of the 1994 Approval of the Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario (Timber Class EA), issued by the Environmental Assessment Board at the end of a four and a half year hearing. The Timber Class EA Approval included a process to ensure that the terms and conditions (Ts & Cs) were incorporated accurately into the FMPM. MNR prepared draft revisions to the manual incorporating the Ts & Cs. All parties to the hearing had an opportunity to review the draft manual and provide comments to MNR. MNR then completed the manual and all parties had an opportunity to make submissions to the EA Board hearing panel, who made a final ruling settling any disputes. The Board issued its final report on October 10, 1995.

The FMPM was approved and regulated under the *CFSA* in October 1996. MNR posted it on the Registry as an exception notice in November 1996, stating it had carried out equivalent public participation. The ECO 1996 annual report concluded that the manual should have been posted as a proposal for public comment on the Registry. We noted that the manual stated planned future revisions would include stakeholder consultation, but did not mention the *EBR* or the required regulation under the *CFSA*. The ECO advised the ministry to comply with the public participation requirements of the *EBR* when it made any future changes to the FMPM.

MNR carried out various reviews of the forest management planning process during the intervening years. MNR developed this public consultation process regulation because it needed to revise the FMPM to incorporate planned changes to the forest management planning rules resulting from these reviews, and the Timber Class EA Review. The planned changes to the forest management planning process also required changes to the Timber Class EA Approval, which was due to expire in 2004.

The review of the 1994 Timber Class EA Approval was carried out in 2002 and finalized in 2003. MNR proposed changes to the Ts & Cs relating to the forest management planning process, generally removing details from the EA Ts & Cs, with the details to be spelled out in the FMPM. MOE approved MNR's proposed new planning conditions with few changes, replacing the 1994 Timber Class EA Approval with a new Declaration Order for Forest Management on June 25, 2003 (see pages 95-104 in the Supplement).

A condition of the Declaration Order requires MNR to propose certain amendments to the FMPM by June 25, 2004. It states that amendments to the FMPM shall be subject to review and comment by the public in accordance with the *CFSA* and its regulations, and that amendments shall be reviewed by MOE for consistency with the conditions of the Declaration Order.

Implications of the Decision

MNR may now finalize proposed revisions to the FMPM because it has made a regulation setting out the public consultation process, as required under s. 68(4) of the *CFSA*. MNR must follow the process set out in the regulation in order to be in compliance with the *CFSA* and condition 51(e) of its Declaration Order under the *EAA* which states that amendments to the FMPM shall be subject to review and comment by the public in accordance with the *CFSA* and its regulations.

This regulation should result in adequate public notice of major amendments to the FMPM proposed in the future. MNR has committed to posting environmentally significant amendments on the Registry as proposals, which is an improvement over MNR's use of the equivalent public participation exception when the FMPM was first regulated in 1996. Further, MNR has designed a public notice and consultation process that exceeds the minimum requirements of the *EBR*, providing some people with additional written notice of an *EBR* proposal notice. This is noteworthy in that interested persons should get written notice of any future environmentally significant amendments, without having to monitor the Registry. It should also mean that more interested parties will learn about the Registry, and refer to the Registry when submitting comments to MNR.

It should be noted however that the regulation also allows MNR to proceed with amendments it believes are not environmentally significant without carrying out any public consultation. The minister may or may not provide notice and a chance to comment on amendments MNR described in its Registry notice as "very minor and administrative."

Public Participation & *EBR* Process

The timing of the postings and approval of this regulation in relation to the Timber Class EA review and the consultations on the actual FMPM is discussed below under "Other Information." The following discussion of public participation focuses on the process regulation (RB02E7001) only.

MNR sent letters to stakeholders, dated July 8, 2002, explaining the proposed regulation and posted a proposal notice on the Registry on July 9, 2002, with a 30-day comment period. MNR should be commended for sending a letter and also for providing a link from the proposal notice to the text of the proposed regulation and to other background materials, including: a forest management planning guide, the FMPM, the 1994 Timber Class EA Approval, the *CFSA* and regulations, and both documents released to that date related to the Timber Class EA Review.

MNR received comments from the ministries of Northern Development and Mines (MNDM) and Environment (MOE), a forestry company, a professional planners' organization and an environmental non-government organization on this proposal. MNR said it received four comments, probably because it did not count MOE's comments as a submission, but as its regulator under the *EAA*. The different parties expressed several common and significant concerns. Many of the comments received on the Timber Class EA review also referred to the issue of how and when the FMPM would be revised.

MNDM stated that "As MNR is proposing significant revision of the original Terms and Conditions of the Timber Class EA approval and asking that many of the new conditions be identified in the FMPM, any amending process should be open to public scrutiny. This can be achieved by requiring that all amendments to the FMPM be posted on the *EBR* Registry." MNDM also recommended that MNR clearly commit to posting an updated proposal on the Registry if the ministry intends to make changes to the proposal. The ministry stated that it still had concerns that in the EA review MNR is proposing a significant reliance on the FMPM, an internal operational manual. "Since the FMPM has not been subject to the rigours of the EA process, the document, and all future amendments, should be subject to a formalized review under the direction of the MOE."

The two non-government groups raised the same concerns. The planners' comments also focused on the *EAA* implications of the decision. They stated that "the proposed consultation and approval process is minimal compared to that which we advocated in view of the unique character of the FMPM as a quasi-Class EA document." "Because so much direction that would normally be in a class EA is being 'downloaded' into the Manual, we urge MNR and MOE to ensure that this regulation provides for a consultation and approval process similar to that for a class EA. That process should include appeal provisions, and final approval by MOE."

The environmental group shared these concerns, because the FMPM would not be revised, nor would a draft even be available, until well after the deadline for comment on MNR's Timber EA Renewal submission, and indeed not until after the MOE is required to make its decision. "This in effect creates a situation where MNR is asking to be relieved of the requirements of the Timber EA decision simply on the speculation that these obligations will reappear in a later version of the FMPM."

The environmental group also said the minister should post an updated notice on the Registry if the ministry makes changes to the proposal and suggested the ministry provide a copy of the updated proposal to persons who received the first notice. They also recommended that all proposed revisions be posted on the Registry. The group also pointed out that the draft regulation does not explain how people should know to indicate their interest. "In our view this is an ambiguous and ill-defined means of identifying those who should be provided with written notice of proposed revision."

The forestry company praised many positive attributes of the proposal but stated that the regulation would be improved if greater transparency and an opportunity for public input in the minister's determination of the significance of proposed amendments were provided. The company suggested that the existing Provincial Forest Policy Committee could be used for this role.

MOE also provided comments and posed questions to MNR. Among its many comments, MOE stated that providing written notice only to persons who have indicated they "are interested in providing comment on the next revision of the FMPM" is too restrictive. MNR did not change the wording, but explained in its response to MOE how it intended to apply the clause: "MNR's first written notice will go to the existing mailing list for the Timber EA (300-400) and anyone who is added by indicating an interest. This mailing list will be updated constantly through the course of normal business."

MNR did not make any of the substantive changes requested by the commenters, but did make a number of minor changes to the regulation between the draft and final stage:

- Added a provision requiring written notification of environmentally significant amendments to the Director of the EAAB, MOE
- Added a description of what the notice shall include, including specific reference to the *EBR* Registry notice
- Added that, if changes to the proposal are reposted, the ministry will provide a copy of the notice to the persons who received the original notice
- Clarified that the opinion as to whether an amendment would have a significant effect on the environment would be determined according to the factors set out in s. 14 of the *EBR*..

MNR's description of the comments and the effect of comments on the decision in its *EBR* decision notice was poor. MNR summarized only four concerns raised by the commenters. MNR did not describe, for example, the strongly worded concerns shared by several commenters that notices of all amendments should be posted on the Registry and should require written notice be sent to interested persons.

SEV
MNR completed a SEV briefing note, demonstrating that the SEV was considered in making the decision. The decision is consistent with the ministry's SEV and does further the purposes of the *EBR*, particularly s. 2(3)(a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario; and s. 2(3)(b) increased accountability of the Government of Ontario for its environmental decision-making.

Other Information
MNR wrote in its first discussion paper on the Timber Class EA review, released in December 2001, that "MNR expects to put this regulation in place in 2002."

At one of the public information sessions held in February 2002, MNR staff stated that the draft FMPM would be released at the same time as the proposed renewal of the Class EA, which was planned for May 2002, so that the public and stakeholders could see the proposed changes. By July 8, 2002 when MNR wrote to stakeholders that they were posting a notice on the Registry for this draft regulation setting out the FMPM amendment process, MNR had decided that "revisions to the FMPM will not be pursued until *after* MNR's submission for extension and amendment of the Timber Class EA approval has received a decision from the Ministry of Environment and Energy."

MNR submitted its Timber Class EA Review to MOE and the public in July 2002. MOE released its draft approval for public consultation in March 2003, and MOE's Declaration Order for Forest Management was approved in June 2003. From this date, MNR had 12 months to propose revisions to the FMPM.

In July 2003, MNR provided a "working draft" of the revised FMPM to selected MNR staff, the forest industry and the Ontario Professional Foresters Association for a three-month review. In September 2003, MNR staff met with interested ministries and federal agencies previously engaged in the preparation of MOE's Declaration Order and provided them with information on the manual revision process and associated timelines. A copy of the "working draft" was provided to them along with clarification on how the conditions of the Declaration Order, as well as comments that had not been included in the Declaration Order, had been addressed in the revised FMPM.

MNR sent letters to the "FMP Mailing List" on October 14, 2003 providing notice that the draft FMPM revisions would be posted on the Registry soon. MNR included members of Local Citizens' Committees and Regional Advisory Committees. A second letter from MNR to "Interested Persons and Organizations" was sent out on November 17, 2003 providing notice of the FMPM revision process underway. It described the proposal posting for the draft revisions to the FMPM posted on the Registry on November 21, 2003 (RB03E7004) with a 60-day comment period running to January 20, 2004. The letter also invited people to attend seven information sessions held across the province in November and December 2003.

This regulation setting out the participation process for FMPM amendments was finally approved on December 8, 2003 and published in the Ontario Gazette on December 27, 2003. The decision notice was posted on the Registry on January 29, 2004.

ECO Comment

Public participation is integral to sound environmental decision-making. This decision review demonstrates how important it is to "consult about consulting." The ECO recognizes the challenge MNR staff face in meeting the requirements of three pieces of legislation – the *CFSA*, the *EAA*, and the *EBR* – in making changes to the forest management planning process and detailed rules. But the complexities are necessary. Because of the cyclical nature of forest management planning, it will be a number of years before revisions to the FMPM are fully implemented across the province, so amendments to the manual have long-term impacts affecting a large portion of the province.

The ECO commends MNR for incorporating the public participation process of the *EBR* into its FMPM amendment process. By requiring written notice to persons who have expressed an interest in commenting on revisions to the FMPM in addition to Registry posting, MNR has added to the minimum *EBR* consultation process. This is consistent with our 1996 recommendation that MNR comply with the notice and comment requirements of the *EBR* when it makes changes to the manual. The addition of required content of the notices was a positive change to the proposal, especially as it specifically informs persons who may wish to comment about the Registry notice and how to provide comments. The ECO encourages other ministries to adopt this kind of approach to integrating stakeholder consultations under other processes with those in the *EBR*.

Positive measures that could improve the consultation effort are available at the minister's discretion – the minister "may" repost a proposal and provide a second written notice if the proposal changes, and the minister "may" provide written notice of proposed amendments considered not environmentally significant. Commenters asked MNR to make these mandatory but the ministry used the *EBR* as its rationale to leave the process flexible. For example, section 13 of the *EBR* states that, for the purpose of posting a notice on the Registry, the question of whether a proposal for a regulation has been so fundamentally altered as to become a new proposal *is in the sole discretion of the minister*. The ECO has found that MNR has used its discretion well in the past, often posting several drafts of complex or controversial policies on the Registry.

Similarly, Section 16 of the *EBR* requires a minister to post a notice of a proposed regulation, such as the FMPM, if it could have a significant effect on the environment. Section 14 sets out the factors which should be taken into account in determining whether a decision may have a significant effect on the environment. The ECO understands MNR's decision to distinguish between FMPM amendments which would and wouldn't be posted on the Registry, and this meets MNR's legal requirements under the *EBR*. However, the ECO may review the exercise of discretion by ministers under the Act, and may review MNR's decision not to post a particular amendment in the future if there is some question that it was environmentally significant. Two of the factors the minister must consider under section 14 in determining whether a proposal may be environmentally significant, include the "geographic extent, whether local, regional or provincial, of any harm to the environment that could result" and the "nature of the private and public interests, including governmental interests, involved." FMPM amendments have the potential to affect a large area of the province, with significant public and governmental interests.

MNR's decision to retain the ability to make "minor, administrative" amendments without providing any notice may meet the legal requirements of the *EBR*, but commenters pointed out that, since the FMPM implements *EAA* terms and conditions, they want notice of all proposed amendments. The ECO recommends MNR strive to provide broad notice of any future proposed "administrative" amendments that involve monitoring, record-keeping or other activities that do not have a direct effect on the environment but are related to EA terms and conditions.

As for the concerns raised by various parties about the role of MOE in reviewing and approving amendments to the FMPM, the ECO concludes that those matters were MOE's to resolve under the *EAA* process. The degree to which MOE permitted MNR to revise the Ts & Cs of the Timber Class EA and transfer details to the FMPM was MOE's decision under the *EAA*. Similarly, like the EA Board in 1994, MOE could have included terms and conditions in its approval of the Declaration Order that gave MOE more control over the FMPM revision process and final approval power over how the forest management planning Ts & Cs would be incorporated into the FMPM. MOE chose not to. It was unrealistic to expect MNR to add provisions such as public appeal to MOE into its FMPM process regulation under the *CFSA*.

Despite the fact that the regulation does not require notice to MOE of amendments that MNR determines will not have a significant effect on the environment, MNR is still subject to the *EAA* approval, and condition 51(f) of the Declaration Order under the *EAA* states that "amendments to the FMPM shall also be reviewed by the MOE for consistency with conditions 1 to 26 of this Declaration Order." MOE also has enforcement powers under the *EAA* if it believes that MNR is contravening any condition of the Declaration Order.

The chronology set out under "Other Information" shows that the regulation prescribing the process for amending the FMPM was proposed early during the Class EA Review, but not finalized until six months after the Class EA had been renewed and MNR had carried out its consultations on the proposed FMPM amendments. This delay was unacceptable. The public should have had full knowledge of the final decision on the public consultation process for FMPM amendments before the process was initiated. MNR posted the proposal for this regulation in July 2002 and should have finalized it as quickly as possible, knowing that it had incorporated the consultation process into the Declaration Order, with a deadline. There was a brief period in the fall of 2003 when regulations could not be approved because of the election call, but that does not account for the entire delay.

As described in "Other Information," although the regulation was not yet finalized, MNR did make a very good effort to notify interested persons about the proposed FMPM amendments in late 2003. MNR provided more written notices than required by O. Reg 428/03, plus additional review periods, meetings and public information centres. This illustrates that MNR is willing to use its discretion to provide consultation opportunities that exceed the minimum legal requirements of the *EBR* and the regulation now approved under the *CFSA*. The ECO will review the actual FMPM revision process MNR carried out and the substantive FMPM amendments after they have been finalized.

Review of Posted Decision:
MNR's Old Growth Policy for Ontario's Crown Forests

Decision Information:

Registry Number: PB7E6009	Comment Period: 30
Proposal Posted: March 12, 2003	Number of Comments: 407
Decision Posted: May 12, 2003	Decision Implemented: May 6, 2003

Description

In May 2003, MNR finalised its Old Growth Policy for Ontario's Crown Forests (Old Growth Policy), and Old Growth Forest Definitions for Ontario (Definitions Report). MNR was required to produce them by May 18, 2003 according to a condition of its 1994 Environmental Assessment Approval for Timber Management on Crown Lands in Ontario (Timber Class EA).

Background

For the first 200 years of logging in Ontario, the very best and largest pine trees were harvested, beginning in the early 1800s for use on British navy ships. After the best were gone, large tracts of red and white pine were clearcut for lumber and land clearing and not regenerated. Although it is difficult to estimate the amount of red and white pine on the landscape before logging began, studies suggest that a very small percentage of Ontario's original white pine forest remains, and that these remnant forests are nationally and internationally important. Of the total growing stock in Ontario, white pine now has been reduced to only three per cent and red pine to 0.8 per cent. In 2001, MNR estimated that about 14 per cent of the remaining red and white pine was considered old growth.

Species such as spruce are much more abundant, and in the north especially, because of fire suppression are aged beyond what would normally be expected. MNR estimates that about 21 per cent of all inventoried forest is old growth. About 75 per cent of the forest in the northeast is considered old growth while less than one per cent of southern Ontario forests are old growth.

Public concern in Ontario about the loss of old growth forests intensified in the late 1980s and centred on the logging of old red and white pine forests in the Temagami area. In 1990, the Ontario government deferred harvest in ten areas of red and white pine in the Temagami area. In 1992, the minister appointed an Old Growth Forests Policy Advisory Committee (PAC), assisted by a scientific advisory committee to address the conservation of old growth. After extensive public consultation the committee submitted interim recommendations on old growth red and white pine in 1993. They submitted their final recommendations covering all species in 1994.

These issues were also discussed at public hearings on MNR's Timber Class EA held from 1989-1992. In its decision released in 1994, the EA Board required MNR to develop an old growth policy to provide an environmentally sound conservation strategy, and definitions of old growth specific to Ontario forest conditions, by May 18, 2003. The EA Board also required other interim steps such as a red and white pine conservation strategy by May 1995.

MNR's A Conservation Strategy for Old Growth Red and White Pine Forest Ecosystems, was originally released in June 1994, but was re-released in 1995, and is sometimes referred to as the

1995 Red and White Pine Conservation Strategy. It stated that, as a minimum, red and white pine in forest management units will not be reduced to an area less than current levels, and required forest management plans to establish specific targets for red and white pine. It also stated that representative red and white pine sites would be protected in each site district, but provided no details.

The PAC stated in its final report, released in September 1994, that this two-page policy statement did not address their interim recommendations on red and white pine. The PAC urged the minister to implement their own thirty-two recommendations related to red and white pine and to provide the public with a policy response and action plan without further delay. But the 1995 Red and White Pine Conservation Strategy was incorporated into the Forest Management Planning Manual in 1996 and silvicultural guides revised in 1998.

In June 1997, MNR released a draft Conservation Strategy for Old Growth Forest Ecosystems on Crown Lands in Ontario for public consultation. That draft strategy was never adopted or finalized. MNR says work on the old growth strategy was postponed while efforts were diverted to enhancing parks and protected areas through the Lands for Life/Ontario's Living Legacy land use planning exercise.

Ontario's Living Legacy Land Use Strategy of 1999 resulted in the creation of a number of new or expanded protected areas that contain old growth forests, particularly red and white pine sites. MNR states in the 2003 Old Growth Policy that, since 1995, the majority of the 10 sites set aside in Temagami have been protected, along with an additional 100,000 hectares of existing old growth red and white pine, in conservation reserves, special zones in existing provincial parks, and provincial park expansions.

Nothing further was released to the public until the draft report Old Growth Forest Definitions for Ontario – a Work in Progress was posted on the Registry for a 30-day comment period in March 2002. The ministry's proposal notice said that "this year, the [m]inistry will resume the development of the comprehensive old growth policy proposal for release early in 2003."

Finally, in March 2003, the draft Old Growth Policy for Ontario's Crown Forests was released for public comment. MNR said it replaced the 1997 draft policy proposal.

Description of the Old Growth Policy

In May 2003, MNR finalised its Old Growth Policy for Ontario's Crown Forests (Old Growth Policy) and Old Growth Forest Definitions for Ontario (Definitions Report). The Old Growth Policy applies to Ontario's Crown forests covered by the EA Approval and in a number of protected areas covered in the Ontario's Living Legacy planning area. It does not cover southern Ontario or the far north.

The Old Growth Policy provides direction for the identification and conservation of old growth forests through natural heritage protection and forest management planning. The goal of the policy is "to ensure that old growth conditions and values are present in Ontario's Crown forests in order to conserve biological diversity at levels that maintain or restore ecological processes, while allowing for sustainable development now and in the future."

MNR has adopted an ecosystem approach to defining old growth: "Old growth is a functional condition of a forest ecosystem that embodies a set of physical features and characteristics, in dynamic forest ecosystems." The definition then describes some typical old growth features and characteristics, including: a complex forest stand; large dead standing trees and accelerating tree mortality; and ecosystem functions that are different from earlier stages of forest development.

The Definitions Report provides definitions for all major tree species or forest community associations present in the province specific to all Ontario Ecological Land Classification ecosites (an ecosite is comparable to a forest stand). Old growth is identified by "age-of-onset" (when the stand begins to be dominated by trees approaching their maximum sizes and ages) and "duration" of old growth conditions. For example, the old growth age-of-onset for white pine ranges from 120 to 150 years and old growth duration ranges from 80 to 450+ years on different ecosites.

The Old Growth Policy sets out a two-pronged conservation strategy – to protect some old growth in parks and to allow a sustainable harvest in forest management units. Objectives have been set in the conservation strategy for natural heritage planning (i.e., parks and conservation reserves) and forest management planning.

Protected Areas
MNR's objectives for conserving old growth in natural heritage planning are:

- To identify representative amounts of forest ecosystems, including old growth stands, for forest communities that should be present in each ecodistrict within provincial parks and conservation reserves within their natural geographic ranges and to allow these protected sites to evolve subject to natural ecological processes.
- To provide for the protection and/or restoration of at least one representative forest stand of old growth red and white pine in each ecodistrict in provincial parks and conservation reserves that lie within the natural geographic ranges of red and white pine – now and in the future.

The policy says that if Ontario Parks determines that old growth representation is incomplete, additional parks and conservation reserves may be created. Over the next few years, "operational direction statements and management planning documents" will be prepared for existing and new protected areas. These operational plans will guide management activities, projects or prescriptions that are compatible with protecting natural heritage values in these protected areas. In addition, Forest Resource Inventories will be used to inventory forest ecosystems in protected areas. Old growth forest in protected areas can count towards meeting targets for maintaining old growth in forest management units.

Forest Management Areas
The objectives in the Old Growth Policy for conserving old growth in forest management units are:

- To identify, consider and provide for the forest age class structure needed to maintain functional old growth ecosystem conditions in forest units for all forest communities within their natural geographic ranges in each management unit as part of future forest conditions.

- To maintain no less than the 1995 amount (the total number of hectares) of red and white pine, while permitting a sustainable harvest now and in the future.

The objectives in the Old Growth Policy for forest management units must be integrated with the forest management planning process and incorporated into forest management plans. Forest management planning is carried out in accordance with the Forest Management Planning Manual (FMPM) and other manuals and guidelines under the *Crown Forest Sustainability Act*. Ten-year forest management plans are developed by industry-led planning teams on each individual forest management unit and approved by MNR.

The Old Growth Policy states that "MNR will develop consistent requirements for old growth conservation in forest management planning to ensure minimum standards and effectiveness in old growth conservation objectives, and strategies over the long-term. These requirements will be communicated through a Forest Management Planning (FMP) Note." The direction will include nine specific requirements set out in the Old Growth Policy. Some of the most important directions are:

- Old growth in all forest units will be identified as a portion (per cent) of current and future forest conditions.
- Historic forest condition will be compared with current forest condition as a context for determining desired future forest conditions and benefits.
- Current, future and historic forest conditions will be used to guide the development of old growth objectives and targets that protect and/or restore, the distribution and abundance of each forest community towards their natural geographic ranges.
- The minimal level of red and white pine will be no less than the 1995 amount, current levels of red and white pine will be maintained, and future levels will be based on desired forest condition determined through a process (similar to the one used to set old growth objectives and targets for forest communities) that will be documented in the plan.

The FMP Note will outline how old growth will be considered for the following parts of the forest management planning process: values, setting objectives, historic forest condition, setting old growth targets, and old growth spatial distribution. MNR began training in fall 2003 for forest management plans being developed for approval in 2006. The policy says the old growth FMP Note will be reviewed and updated as required.

The Old Growth Policy also adds five species to MNR's lists of "selected wildlife species": the black-backed woodpecker, the red-breasted nuthatch, the ruby-crowned kinglet, the lynx, and the black bear. The habitats of these species are used as indicators for assessing forest sustainability during the development of a forest management plan.

The Old Growth Policy also outlines a number of initiatives that MNR will pursue over the next five years including the revision and development of forest management guides, spatial modelling of natural disturbances and landscape patterns for forest management planning, and changes to MNR's planning system. Similarly, the Definitions Report describes next steps underway and the need to address recognized shortfalls in the data and research on old growth forests.

MNR will report on the status of old growth every five years in its state of the forest reports. The results will show trends in the quantity and distribution of old growth in ecoregions, and trends in the per cent of an area classified as old growth in provincial parks, conservation reserves and forest management units. MNR said the quality and reliability of the information would increase over time.

The new Old Growth Policy replaces the Conservation Strategy for Old Growth Red and White Pine Forest Ecosystems, although the 1995 strategy will remain in effect for those forest management plans approved prior to 2006. Because of the cyclical nature of forest management planning, some management units will not apply this new policy until they are planning their 2010-2020 forest management plans. The Old Growth Policy is scheduled for review in five years (2008) and may be updated sooner, if required, to reflect any significant changes in Ontario's forest policy, legal authority, or program delivery.

Implications of the Decision

The Old Growth Policy does not strengthen protection for red and white pine, as it largely confirms the policy decisions made in the existing 1995 Red and White Pine Conservation Strategy. In fact, the legal status of existing old growth rules have been weakened.

The 1995 Strategy was incorporated into the FMPM when it was regulated under the *CFSA*. Specifically, the 1996 FMPM required that "objectives for old-growth conservation must be developed within the context provided by the Conservation Strategy," included in an appendix. That requirement has been removed from the FMPM in the revisions proposed in November 2003, and it does not incorporate the Old Growth Policy. The revised FMPM only says the 2003 Old Growth Policy will be made available to planning teams as one of a long list of documents that "provides direction and helps to make decisions." Further, the section in the November 2003 draft FMPM on setting objectives did not mention old growth or the requirements of the Old Growth Policy. In response to public concern, MNR did include a requirement for FMPs to develop management objectives and targets for old growth in the final document approved in June 2004, but does not link them to the Old Growth Policy

The Old Growth Policy direction has been incorporated into a new type of policy document called a Forest Management Planning Note which is not recognized in the FMPM and has no legal effect under forestry legislation. The FMPM requirement to document red and white pine old growth as values on maps and in the FMP is unchanged, but it is only one element of the policy, and has been required in the FMPM since the 1994 Timber Class EA decision.

The new policy of allowing old growth forest in protected areas to count towards meeting old growth targets in forest management units could be a step backward for old growth conservation if it is used to allow the area of red and white pine maintained in the harvestable forest area to decrease lower than the 1995 level.

The policy does provide new direction for other tree species, however, requiring that old growth of all forest communities be identified and considered in forest management planning, and that representative amounts of all species be present in provincial parks and conservation reserves. But the direction to consider historic forest conditions is vague, and is not clarified by the FMP

Note. The FMP Note suggests several types of historical records that planning teams may wish to use to describe the historic forest and states that "if the planning team determines that restoration measures should be considered, regional planning specialists will be consulted to ensure a broader consideration of the need."

Another significant decision is the addition of five wildlife species to the list of featured species and the direction to use old growth as habitat in assessing forest sustainability during the preparation of forest management plans. This could add to the protection of old growth forests and benefit all wildlife species that depend on old growth conditions. Again, it will depend on how it is implemented. The Old Growth Policy doesn't explain how the species will be considered when forest sustainability is assessed. The FMP Note says the five species have been added to the regional selected wildlife species lists/matrices and "Regional staff will provide advice to FMP planning teams on how to use the wildlife matrix in forest sustainability assessment."

The environmental, social and economic implications of the decision are difficult to assess at this time. The forest industry raised concerns about the social and economic impacts on wood supply, pointing out that no social or economic impact assessment was conducted. In its decision notice, MNR stated that "the appropriate assessment of the impacts of the Old Growth Policy on wood supply is through the forest management planning process as realistic objectives are set for old growth," implying that the policy is flexible enough to adjust as it is being implemented.

With the recent changes to the forest management planning process, each forest management plan will now be developed for a ten-year period, and achievement of long-term objectives will be reported on in year seven and year ten annual reports. It could be decades before the policy is fully implemented across all planning units and until old growth objectives and targets are readjusted in some units. It will be years before meaningful data are analysed and reported.

MNR said that it would report on old growth in the State of the Forest Report every five years, and that the data would become more accurate. This will be very important, in order to see whether the policy is effective. MNR only provided two statistics in the Old Growth Policy which lumped all species together and did not provide any information on red and white pine. The State of the Forest Report 2001 provided little information on trends. It appears that, while the total area of red and white pine in hectares increased between 1996 and 2001, (which MNR says likely occurred because of increased emphasis on identifying old growth white pine stands in Ontario in the last ten years) the amount of red and white pine older than 120 years declined in forest management units. Despite MNR's prediction in the 1995 Conservation Strategy that the policy would have significant impacts on wood supply to the forest industry, the volume of red and white pine harvested increased every year from 1994/1995 to 1999/2000.

Public Participation & *EBR* Process

MNR provided the public with a 30-day comment period on the draft Old Growth Policy by updating PB7E6009 on March 12, 2003. This notice had initially been published on July 2, 1997 to provide a 30-day comment period on the 1997 draft policy. The notice was also updated on

March 28, 2002 to provide the public with an update and provide a 30-day comment period on the draft Definitions Report that was also finalized in May 2003.

MNR said it received 407 comments on the proposal, and that 13 were letters in response to this posting and contained substantive comments. The remaining letters were received in response to this notice and/or Registry notice RA03E0004 – MNR Class EA Approval for Forest Management on Crown Lands in Ontario. The majority of these were essentially form letters. MNR did not describe comments received on the draft old growth definitions report posted in 2002.

MNR received a request from environmental groups to extend the comment period on the old growth strategy. First Nations also requested a 60-day extension to the comment period so that MNR could consult with First Nations communities and they could have enough time to formulate community responses. MNR did not grant an extension to the comment period.

Many commenters accused MNR of producing an incomplete draft policy at the eleventh hour. One environmental group represented on the PAC observed that MNR had still not implemented most of the committee's recommendations. The group said "it is difficult to evaluate the old growth definitional work done in this report in the absence of other related inventory, policy and decision-support tools which the report indicates are still under development." Similarly, "the policy appears to include a number of references to policy or management pieces which are not yet developed; in our view, until the policy pieces or management guides upon which the old growth strategy is to rely are developed, the old growth strategy or policy itself cannot be considered – and will not be – complete."

The Canadian Parks and Wilderness Committee-Wildlands League, Federation of Ontario Naturalists, Sierra Club of Canada and Earthroots prepared a joint submission. They were disappointed with the draft policy and believed that it did not meet the legal requirements of the Timber Class EA or the conservation requirements for old growth in Ontario. They recommended: "it is essential that the MNR develop the 'consistent requirements for old growth conservation' before the end of the current EA approval, and include them as part of this old growth policy." They said that the direction can be based on the considerations suggested in the draft, and should require the maintenance and/or restoration of the average or representative amount of old growth historically present in the natural (pre-industrial) forest. The groups proposed that the objective for conserving old growth in management units should be changed to require restoration of red and white pine levels above the 1995 amount in hectares, which represent an already severely degraded composition. They also had concerns about MNR's decision to allow protected areas to contribute to old growth objectives.

The almost 400 form letters asked MNR to include a clear minimum requirement in the old growth strategy for companies to retain natural levels of old growth forests in the managed forest outside of protected areas.

A scientist who studies old growth also noted that the policy had taken 10 years to complete, an inordinate amount of time for a matter of national and international importance. He noted that there has been considerable scientific investigation into old growth forest in Ontario during those ten years, which seems to have been missed or ignored in the development of the policy. He also questioned the choice of 1995 as a baseline year and suggested that some reason needed to be given to the public for any year that is chosen. He provided data for Algonquin Park suggesting a decline in white pine of at least 50 per cent since the early 1800's and a decline in the mean diameter from 75 cm in circa 1850 to 45 cm in 2000. "Choosing an earlier time period and certainly looking at earlier age and size-class distributions might be much more ecologically meaningful for a policy like this." Among other points raised, he suggested that it was essential from a science perspective to distinguish between 'primary' and 'secondary' old growth forests in the protected areas section of the policy. He also argued that the choice of species suggested as old-growth indicators was not well supported by science, and suggested several changes. He concluded with a very strong indictment of the draft policy: "I believe it is flawed, deficient, takes only limited advantage of available information, and is not well-founded on science. I recommend that it not be released until major improvements have been made."

Forest industry commenters praised two aspects of the policy: that the document recognized the contributions of parks and protected areas in achieving the objectives of the Old Growth Policy; and that the document refrains from providing any specific quantitative targets for protection of old growth. They raised several concerns about the potential social and economic impacts of the policy, particularly on wood supply. They charged that no social or economic impact assessment was conducted; the full impacts of the policy will not be known until it is fully incorporated into the forest management planning process; and the spatial planning tools required to fully implement and assess the impacts of the policy have not been developed. They also recommended MNR delete any reference to any wildlife species associated with old growth forests. They also suggested that younger and older forest stands outside of the specified ranges could be managed to produce most, if not all, of the old growth objectives, such as complex structure, snags and wildlife habitat. They also pointed out that the directions on objectives for conserving red and white pine mentioning 1995 and current levels are unclear and confusing.

The forest industry commenters shared the environmental groups' concern that MNR would address the development of "consistent requirements for old growth conservation in forest management planning" solely through forest management planning training. The industry association recommended that MNR "develop, in consultation with industry, and incorporate clear direction and requirements for the implementation of the Old Growth Policy into either the policy itself or the Forest Management Planning Manual to ensure consistent application across the province."

MNR did revise the text of the Old Growth Policy to respond to these comments. The draft policy had said only that the direction for old growth conservation in forest management planning would be "provided through forest management planning training." In the final policy MNR added the statement that the requirements would be communicated through a Forest Management Planning Note. MNR added a paragraph describing the purpose of the FMP Note, and stated that it will be reviewed and updated as required to reflect ongoing work that may affect forest management planning. This did not address the desires of commenters that the requirements should be incorporated in the Old Growth Policy itself and/or in the FMPM.

MNR made some other changes to the decision as a result of public comments. The most significant change MNR made to increase environmental protection was to insert a direction that historic forest conditions will be used to guide the development of old growth objectives and targets that protect and/or restore the distribution and abundance of each forest community towards their natural geographic ranges. But as discussed, the reference to "historic forest condition" is vague and is not clarified in the FMP Note, and there is no requirement in the November 2003 draft FMPM to include old growth objectives FMPs. MNR made several other minor changes to address specific detailed comments, and wrote a detailed letter to explain its response to at least one of the commenters.

MNR did describe some of the comments in the decision notice and explained why it did or did not make the changes requested. But MNR failed to describe some comments or misconstrued them and did not respond adequately. MNR said that a number of comments requested clarification of several points in the policy, for example reference to the year 1995 in the red and white pine objective. While there were requests for clarification of the reference, there were also major concerns expressed about this policy decision. MNR should have acknowledged that commenters recommended that the objective should be to restore red and white pine above 1995 levels.

MNR also said that some of the comments indicated that further consultation should occur during the development of the spatial modelling tools – MNR said it would determine how best to involve appropriate stakeholders during the development of the spatial modelling tools. This was not an accurate description of the comments. Commenters in fact asked for consultation during the development of the "consistent requirements for old growth conservation in forest management planning." MNR did not respond to this or provide any opportunity for consultation during the development of the FMP Note.

MNR responded to the charges that it had not met the legal requirements because some elements of the policy will be delivered after the May 18, 2003 legal deadline. "The MNR position is that the EA Board required the finalization of the Old Growth Policy by May 18, 2003 deadline, which does not mean that all requirements had to be implemented. The MNR deems the conservation of old growth to be an ongoing commitment."

SEV

MNR provided a detailed Statement of Environmental Values briefing note that concluded that the policy is consistent with MNR's SEV and all three purposes of the *EBR*. The ECO agrees with most aspects of MNR's analysis.

Other Information

In its 2002 Timber Class EA Review, MNR proposed removing the requirement for the old growth policy from the renewed approval because it was planning to meet the deadline. Many stakeholders reacted negatively to MNR's proposal because the policy had not been developed yet. As a result, in its proposed Declaration Order for Forest Management, MOE re-inserted a condition that MNR must develop an old growth policy by May 18, 2003 and include a schedule for its application in forest management planning. Many commenters requested that MOE not accept MNR's draft Old Growth Policy as proposed in March 2003 as fulfilling the condition.

For further information, see the ECO review of MOE's Declaration Order for Forest Management approved in June 2003, on pages 94-99 of this year's annual report and on pages 95-104 of this Supplement.

ECO Comment

The ECO urged MNR several times over the past few years to finalize the old growth conservation strategy it was developing. It is unfortunate that MNR did not make much progress on developing this policy until close to the end of the nine years it was allotted. One consequence is that many aspects of the policy are still to be described or produced outside the policy, e.g., conservation requirements still to be developed, and other policy, inventory and implementation tools still under development. Another consequence is that the public and most stakeholders did not see the draft until two months before it had to be finalised. The comment period was limited to 30 days, while the same stakeholders were commenting on the EA Declaration Order for Forest Management, and MNR had only a month after the close of the comment period to finalise the policy.

There were some common concerns among stakeholders, even though they approached the issue from a different perspective. For example: the need for public consultation and formal policy status of the direction for forest management planning and the need to clarify the references to historic, 1995 and current levels of red and white pine. The ministry did make a number of changes to the draft policy before finalising it but these are two areas that still require attention.

The ECO is very concerned that MNR has removed old growth policy direction from the FMPM and instead has created a non-binding new policy document called an "FMP Note." For example, the direction in the Old Growth Policy that "old growth in all forest units will be identified as a portion (per cent) of current and future forest conditions" clearly should have been incorporated into the section of the FMPM which sets out the requirements for identifying the current and future forest condition when preparing a forest management plan. MNR should have taken this approach, especially given the timing of the two initiatives – the Old Growth Policy was finalized in May 2003 and the draft revisions to the FMPM were posted to the Registry for public comment in November 2003.

The ECO sees this as a creeping loss of transparency and an abdication of the spirit of the *CFSA*. The legislation requires forest management plans to be prepared and approved in accordance with the requirements of the regulated Forest Management Planning Manual. It includes specific types of requirements that the FMPM will set for forest management plans, such as describing the condition of the current and future forest, and forest management objectives and strategies applicable to the management unit. For example, the *CFSA* says that the FMPM shall require that every forest management plan contain provisions respecting "Crown forest diversity objectives, including consideration for the conservation of natural landscape patterns, forest structure and composition, habitat for animal life and the abundance and distribution of forest ecosystems."

After finalizing its Old Growth Policy, which must be implemented through the forest management planning process, MNR chose not to incorporate it into the FMPM. To plan to implement the requirements for old growth conservation in forest management through a policy document that can be amended without public consultation, and has no legal effect, is a serious departure from the legislative framework set out in the *CFSA*. The FMP Note is not an adequate policy vehicle for forest management planning requirements.

The Old Growth Policy states that "MNR will develop consistent requirements for old growth conservation in forest management planning to ensure minimum standards and effectiveness in old growth conservation objectives, and strategies over the long term." As written, it appears as a commitment to *develop rules and standards* for forest management planning. The September 2003 FMP Note may have fallen short of this expectation, but it was part of the continuing development of the Old Growth Policy and required public consultation. These "consistent requirements" constitute "policies" under the *EBR* and the public and industry should have an opportunity to comment on them, especially as MNR says they will probably be revised annually. The more detailed rules and standards must be incorporated in the Old Growth Policy. All the forest management planning direction should be contained in the Old Growth Policy, as it is the document which, for now, is referred to in the FMPM and the Forest Operations and Silviculture Manual. Key Old Growth Policy direction should also be incorporated into the FMPM, as suggested by the forest industry, so that it has legal effect as requirements in the forest management planning process. See the ECO review of the FMPM public consultation process on pages 149-156 in the Supplement.

The ECO recommends MNR clarify the Old Growth Policy, to ensure that the decision to allow old growth in parks to meet objectives for maintaining old growth in forest management units, cannot be used to permit the total area of red and white pine in forest management units to decrease below 1995 levels. This would mean that gains in parks would be offset by losses on Crown lands in forest management units. It would be wrong to let the total area of red and white pine in Ontario to decrease as a result of this new policy. The landscape ecology approach should require the total amount to be maintained or increase, with the red and white pine in all age classes in FMUs managed to supply a sustainable harvest and future old growth across the landscape to replace the old growth in parks as it ages and is destroyed by natural disturbance.

MNR should also develop policies and plans to identify and conserve old growth forests in southern Ontario. The PAC recommended in 1994 that the goal should be to conserve Ontario's old growth forest ecosystems throughout the province, and that "priority should be given to those species which are most rare and threatened, such as the remaining portions of the Carolinian." The Definitions Report also covers southern Ontario and highlights both the conservation issues and the shortage of data. The pressures on southern Ontario's vanishing woodlands are immense and urgent, as we report in this year's annual report on pages 29-30.

The PAC had also recommended to MNR in their 1993 report on red and white pine that the old growth areas assigned for protection should be designated under legislation such as an *Ecological Reserves Act* or an amended *Provincial Parks Act*. This is consistent with ECO recommendations to MNR to review the *Provincial Parks Act* and the *Public Lands Act* to create a new legislative framework for provincial parks and protected areas, including conservation reserves. For further information, see ministry progress on recommendations on page 163 of this year's annual report. MNR says that over the next few years operational plans will be prepared for protected areas, but as we report on pages 41-47 of the annual report, MNR is not required under existing legislation to prepare management plans and its track record on this point is extremely poor.

MNR should also establish sound representation criteria that address issues of rarity, primary and secondary forest, the degree of human intervention, and the role of fire. The issue of rarity, in particular, needs to be addressed. Some sites might warrant protection, not because they are the most representative site, but because they are so rare, for example the most northern example of an old growth pine community.

MNR announced April 1, 2004 its intention to require all Sustainable Forest Licence holders be certified to an accepted performance standard by 2007. The ECO notes that under such certification, the forest industry will likely have to meet much higher standards for old growth conservation than the minimum requirements set out in MNR's Old Growth Policy. For example, the Forest Stewardship Council's current draft standards for Ontario's white pine and old growth forests have greater sophistication and are more rigorous than the direction in MNR's Old Growth Policy.

The Definitions Report provides a sound basis for an ecosystem approach to old growth identification and conservation, although MNR is still working on the data collection, spatial modelling and analysis. The direction in the Old Growth Policy to identify all old growth forest communities and consider historic conditions in setting objectives and targets in forest management plans for the protection and/or restoration of old growth is a good policy. But it is too vague and requires further definition and incorporation into forest management planning rules.

The effectiveness of MNR's Old Growth Policy will depend on further development of detailed directions by MNR, continuing science and inventories, and the decisions made at the local level in each forest management plan. It will take careful monitoring of individual forest management plans by members of the public to check whether the policy is being implemented. The ECO will continue to monitor MNR's progress on revising and implementing the Old Growth Policy.

Review of Posted Decision: Stormwater Management Planning and Design Manual

Decision Information:

Registry Number: PA09E0012
Proposal Posted: November 26, 1999
Decision Posted: April 1, 2003

Comment Period: 60 days
Number of Comments: 11

Description

In April 2003, MOE posted on the Registry a decision notice on the Stormwater Management Planning and Design Manual (SWMP Manual). This manual is an update of an earlier version, published in June 1994. MOE published an earlier guide to stormwater management planning, entitled "Stormwater Quality Best Management Practices" in June 1991.

The latest manual is comprehensive in scope, reflecting advances in the field of stormwater engineering and environmental planning since 1991. It is intended to provide both technical and procedural guidance for the planning, design, and review of stormwater management practices associated with urban development.

The SWMP Manual begins with a comprehensive description of the environmental planning process and its relationship to municipal land use planning and approval processes. It then provides detailed descriptions of environmental design criteria, overall stormwater management planning (SWMP) and the options for "lot level" controls for stormwater management. It devotes a special section to the challenges of managing stormwater for "in-fill" development within already developed areas. The last two chapters cover operation, maintenance and monitoring, and capital and operational cost considerations. A number of technical appendices provide guidance on design approaches and examples of design calculations.

To reduce its impact on watercourses, stormwater runoff from developed urban areas may be managed in a variety of ways, including: "lot level controls" which promote infiltration at the source; conveyance controls, where water is stored or infiltrated during transport, and storage in "end-of-pipe" facilities (usually ponds) prior to discharge to waterways. These measures may be used to address water quality impacts, hydrologic impacts, in-stream channel erosion concerns, or a combination of these. The SWMP Manual recommends a "treatment train" approach to stormwater management "premised on providing control at the lot level and in conveyance (to the extent feasible) followed by end-of-pipe controls".

This version of the SWMP Manual introduces the relatively new area of managing stormwater flow for the prevention of in-stream erosion. The emphasis on stormwater flow management in the recent past has been to prevent increases in peak flows to the receiving streams to reduce flooding concerns. However, even when stormwater controls are introduced which keep peak flow under control, increases in total runoff from developed areas can cause significant increases in stream bank and channel erosion. The new SWMP Manual section will be of assistance to municipalities taking erosion concerns into account when developing their master drainage and subwatershed plans.

Implications of the Decision

The revised SWMP Manual extends the knowledge base beyond the previous version and provides a valuable reference to engineers, planners, developers and approval agencies. Practitioners will be using more up-to-date information and guidance that can result in improved stormwater management.

End-of-pipe storage devices, ponds or artificial wetlands designed to reduce urban runoff impacts are considered treatment systems requiring approval by MOE under the authority of Section 53 of the *Ontario Water Resources Act (OWRA)*. The Certificates of Approval (Cs of A) that are issued by MOE are not posted on the Environmental Registry for public comment because they do not set effluent limits, and are therefore considered exempted by the Instrument Classification Regulation, O.Reg. 681/94 under the *EBR*.

The SWMP Manual is used by the ministry as a reference document in reviewing applications for Cs of A for stormwater management systems, and by municipalities, developers and their consultants. Typically, approval for these systems would require at a minimum that they are consistent with the standard design criteria put forward in the manual. However, as the ministry states in the preface to the manual: "It is important that the Manual be viewed as a tool for understanding the performance requirements of stormwater management projects and not as a rulebook for all stormwater management solutions."

The Environmental Design section of the manual provides sizing criteria for various end-of-pipe stormwater management facilities to achieve one of three different levels of water quality protection: basic, normal or enhanced. This is an important innovation that has implications for decision-making by municipalities and review agencies. Specifications for enhanced protection level stormwater ponds, wetlands or infiltration devices provide 80 per cent long-term removal of suspended sediment from stormwater, whereas facilities constructed according to the basic design only remove about 60 per cent of sediment. Where a subwatershed plan exists, which level of protection is selected is recommended to be based on water quality or fisheries habitat protection and management needs. But where no subwatershed plan exists, the level of protection is decided by the municipality, subject to input by review agencies commenting under the provisions of the *Planning Act*. Some municipalities may even opt to make the enhanced level of water quality protection mandatory, as has been done by the Lake Simcoe Region Conservation Authority's member municipalities.

Public Participation & *EBR* Process

The manual is the product of the efforts of a large number of agencies, individuals, consultants and associations, with MOE in a coordinating role. Prior to posting the proposal notice on the Registry in November 1999, feedback on the 1994 version SWMP Manual was obtained through various means. These included a User's Survey distributed in 1994. A questionnaire was circulated in 1997 to provincial agencies, Conservation Authorities, municipalities and other stormwater management professionals. A stakeholder workshop was also held in January of 1998 and MOE circulated a revised draft SWMP Manual for comment in the fall of 1998.

The revised SWMP Manual was posted as a policy proposal on the Environmental Registry in November of 1999. A decision was posted in April of 2003. Comments were accepted for the first sixty days of this period. This is an exceptionally long time – three and a half years – for MOE to take to incorporate public input into, and issue the final version of, the policy document. The ECO is concerned about such a lengthy delay, because the public may have been left wondering if the proposal had been abandoned. If necessary, MOE could have updated its 1999 proposal notice to keep the public informed about progress on a final version of the SWMP Manual.

A total of 11 commenters submitted approximately 62 pages of comments in response to the *EBR* Registry proposal. One commenter submitted 29 pages of highly technical review comments. In general, MOE could have done a better job of accounting for its handling of comments. In total, only 10 MOE summary comments were contained in the decision notice. In some cases, technical points raised by commenters resulted in various manual sections being rewritten or dropped, and in other cases review comments were disregarded. The following summarizes some of the observations made by the ECO on reviewers' comments and MOE's response.

Responding to comments from several reviewers, MOE further emphasized that the SWMP Manual should be "viewed as a tool for understanding the performance requirements of stormwater management projects and not as a rulebook for all stormwater management solutions." MOE also responded to commenters concerned about the draft manual's mention or omission of specific proprietary technologies and devices, stating that it does not preclude or recommend the use of any device as long as the proponent can prove that it meets the required criteria for water quality protection.

Reviewers criticized various elements of the generic guidance on vegetative buffer widths to protect watercourses. MOE removed the guidance in the final version, stating that, in addition to the site-specific nature of their design, buffers are best established to conform to subwatershed plan objectives, or in consultation with the local Conservation Authority.

Concerns were also expressed about creation of artificial wetlands as stormwater management systems. MOE considers that constructed wetland systems are "first and foremost stormwater management facilities that must be maintained". However, some reviewers expressed concerns about the management of these systems, e.g., the need for routine monitoring of sediment quality to ensure that waterfowl and other wildlife are not put at risk. Guidance on monitoring was not comprehensively addressed in the final version of the manual, as MOE stated that monitoring requirements should be discussed in consultation with the Conservation Authority, and that some jurisdictions have specific monitoring requirements.

One of the major issues surrounding urban stormwater retention facilities is operation and maintenance. Periodic maintenance is the responsibility of the municipality, and it is costly, but necessary to ensure the facilities continue to operate at their designed efficiency. One reviewer noted that a recently completed comprehensive report on this subject was now available. The "Stormwater Management Facility Sediment Maintenance Guide, August, 1999," was prepared for several Conservation Authorities and southern Ontario municipalities, and released just before the SWMP Manual draft. Information in the MOE manual on stormwater pond sediment management and facility maintenance could have been updated to reflect findings in this report.

The ECO encourages MOE to include this information in a future revised version of the SWMP Manual.

The SWMP Manual describes end-of-pipe facility designs sized to achieve three different levels of stormwater water quality treatment. In the draft SWMP Manual it was stated that the "normal" level of water quality protection – which gives about a 60 per cent rate of sediment removal – be considered as the minimum standard. Several commenters expressed concern on this point, commenting that the "normal" level of water quality protection – providing seventy per cent sediment removal - should be considered the minimum standard. However commenters pointed out that most municipalities require the "enhanced" level of protection in any case. One reviewer commented that the BATEA (Best Available Technology, Economically Achievable) approach would indicate a requirement for "enhanced" level water quality protection, which provides 80 per cent sediment removal. MOE revised the manual to clarify that the level of water quality protection – i.e., sediment removal – should be based on receiving water criteria, derived from subwatershed study requirements or review agency input.

End-of-pipe facility design specifications in the manual are based on a 24-hour drawdown period for water in storage. One reviewer suggested that facilities design criteria could have also been given for a 48- hour drawdown. MOE did not provide this additional set of specifications; however, this is reasonable, given that any number of assumptions can be made to establish design specifications, and ultimately, these have to be limited to avoid confusion. As MOE points out, facilities design can be varied, as long as they are at least demonstrated to be equivalent to designs described in the SWMP Manual.

A section of the manual receiving several reviewer comments was the discussion of "off-site systems" (OSS) and financial contribution (FC) ("cash-in-lieu") programs implemented by municipalities under their by-laws. These are alternatives which may be provided to developers where space constraints do not allow stormwater detention facilities to be constructed, often the case for in-fill developments. In these cases, local by-laws often allow the proponent to provide a payment to contribute to the construction of stormwater management systems elsewhere in the watershed. Much of what MOE stated in this section of the draft SWMP Manual would be problematic if applied to larger in-fill development. MOE clarified the applicability of the manual section on this subject, stating that its focus is upon in-fill areas of five hectares or less. This section of the manual was also considerably expanded, in part to better address concerns related to compliance with the water quality and fish habitat goals of the *Fisheries Act*.

There were several comments by reviewers concerning contradictions in various sections of the manual. In part, this is due to the wide-ranging discussion of the various aspects and evolving nature of the practice of stormwater management; therefore, the ECO trusts that MOE will continue to treat the SWMP Manual as a document to be continually updated and improved upon in consultation with stakeholders.

SEV
MOE submitted a brief statement supporting the SWMP Manual's consistency with MOE's SEV:

Environmental Protection
MOE states that the SWMP Manual enhances environmental protection by providing guidance on the proper planning and design of stormwater management practices to mitigate the impacts of urban land development.

The Ecosystem Approach
MOE states that the SWMP Manual advocates an ecosystem approach that integrates watershed/subwatershed planning with land use planning.

Resource Conservation
MOE contends that the ecosystem approach advocated and the guidance given in the manual will protect aquatic and terrestrial resources and water quality.

MOE also stated that the SWMP Manual provides guidance to both the review agencies and the development industry and helps to streamline the approval process.

Other Information
Numerous initiatives to improve urban stormwater management are underway in several southern Ontario municipalities. The City of Toronto has undertaken an ambitious strategy of Wet Weather Flow Management and has developed a 25-year Implementation Plan. The Wet Weather Flow Master Plan, which has been described in the city's July 2003 overview document, was developed "considering the whole natural hydrologic cycle within the context of watershed management and ecosystem protection". In general, the city's plan represents a shift in thinking about urban water resource management – stormwater should be considered a resource rather than a problem. As one example, about 25 per cent of the soils in the City of Toronto area are suitable for pervious pipe systems to allow stormwater to be infiltrated into the groundwater system; as infrastructure is renewed over the 25-year implementation period, such systems will be considered routinely and built as the situation allows.

The Oak Ridges Moraine Conservation Plan is another example of ground-breaking planning that recognizes the potential for cumulative impacts on water resources resulting from urban development in this protected area. In order to protect hydrologic and other related features of the Oak Ridges Moraine, the plan specifies that: "Except with respect to land in Settlement Areas, all development and site alteration with respect to land in a subwatershed are prohibited if they would cause the total percentage of the area of the subwatershed that has impervious surfaces to exceed (a) 10 per cent; or (b) any lower percentage specified in the applicable watershed plan." This is a significant policy precedent in that it recognizes that high quality water resources and urban development cannot coexist unless the latter is of a limited extent and regulated within a watershed planning context.

ECO expects that the *Greenbelt Protection Act*, currently before the legislature, will also lead to a high level of water resources protection in certain parts of southern Ontario, and that this protection may require mandatory watershed planning and planning constraints on urban growth.

ECO Comment

While the SWMP Manual provides guidance on a number of emerging stormwater management areas, e.g., erosion control, it generally leaves decisions on standard of treatment, and the selection of the goals and objectives to be achieved through stormwater management up to the municipalities. It also promotes watershed and subwatershed planning as the context within which stormwater management plans are to be developed. This emphasis on an integrated planning approach is laudable; however, in support of this approach, there are places in the SWMP Manual where a precautionary approach would have promoted a better selection of stormwater treatment options. For example, MOE could have indicated that the highest level of water quality protection ("enhanced" protection) be the norm in selecting sizing criteria for stormwater facilities design. Many municipalities are now basing sizing requirements for facilities around this level of design, or better.

The manual's description of receiving water situations in which "basic" or "normal" facilities design criteria may be used appears not to take adequate account of fish habitat protection and water quality objectives. The manual states: "Basic protection would only be acceptable where the receiving aquatic habitat is demonstrated to be insensitive to stormwater impacts and has little potential for immediate or long-term rehabilitation". This appears to be a blanket decision to "write off" some watercourses entirely, and a contradiction of MOE Policy on Surface Water Management Policy which states: "Water quality which presently does not meet the Provincial Water Quality Objectives shall not be degraded further and all practical measures shall be taken to upgrade the water quality to the Objectives." "All practical measures" could be argued to potentially include the enhanced level of stormwater facilities design, and their selection would support no further degradation.

Unlike sewage treatment or drinking water treatment facilities, end-of-pipe stormwater detention facilities are "passive" – water flows in, is stored for a period of time, and particulate matter settles. Soluble contaminants such as chloride from road salting and dissolved phosphorus are not effectively removed. Soluble pesticides used by homeowners and lawn care contractors are also frequently detected in stormwater runoff and are in some cases found at levels exceeding guidelines for the protection of aquatic life. Therefore, in some cases, treatment of stormwater beyond the guidelines contained in the manual may need to be specified by a municipality, provincial agency, or Conservation Authority. For example, where there are urban development impacts on recreational water use, additional treatment such as ultraviolet disinfection to remove bacterial pathogens may be required.

There is a evidence in the scientific literature that indicates that when the impervious surfaces (paved over and roofed-over surfaces) rise above 10 per cent of the area in a watershed, fisheries, stream channel shape, groundwater recharge, minimum base flow and other natural and water resources attributes of the watershed begin to deteriorate. Provincial Water Quality Objectives are likely to be exceeded above this development level as well. When these patterns of development occur, the ecological integrity of watersheds may be threatened or even be on the brink of irreversible degradation. Such areas could quite realistically reach a point where the issuance of further Cs of A for stormwater facilities under the *OWRA* would allow degradation of water quality below provincial objectives in the receiving streams. In other words, cumulative impacts of development can become a problem, even if individual projects include stormwater controls designed according to the SWMP Manual.

Based on comments from the reviewers of the manual and ECO's review, there appears to be a need for better provincial guidance and policies on the implementation of stormwater management practices. As mentioned previously, management of stormwater itself continues to evolve, and ECO therefore urges MOE to continue its dialogue with municipalities, other agencies and stakeholders involved in the process, and to continue working to improve this useful reference work.

MINISTRY OF NORTHERN DEVELOPMENT AND MINES

Review of Posted Decision:
Falconbridge Mine Closure Plan

Decision Information:

Registry Number: ID03E1002	Comment Period: 30 days
Proposal Posted: February 25, 2003	Number of Comments: 1
Decision Posted: July 24, 2003	Decision Implemented: July 24, 2003

Description

In July 2003, the Ministry of Northern Development and Mines (MNDM) acknowledged receipt of a certified Closure Plan for Falconbridge's Montcalm Project. Under the *Mining Act*, mining companies are required to file Closure Plans with the ministry describing the rehabilitation measures to be implemented when shutting down operations. They must file these plans prior to starting operations at a particular mine. In this case, Falconbridge began development of a new underground nickel and copper mine called the Montcalm Project in 2003. This mine is expected to reach full operation in 2004, producing 2,050 tonnes of ore per day. Mine ore will be transported to Timmins for milling. (For further information regarding this project, refer to pages 105-111 of the Supplement).

The proposed Closure Plan included information related to:
- Closure and flooding of underground mine openings
- Removal and disposal of buildings and machinery
- Removal of chemicals, explosives and wastes
- Testing, remediation and/or removal of contaminated soils
- Removal and disposal underground of any potentially acid generating waste rock
- Revegetation of the site
- Post-closure monitoring.

Since Falconbridge filed a Closure Plan that follows the format described in the Mine Rehabilitation Code (Schedule 1 of O.Reg. 240/00 of the *Mining Act*), the Plan is considered to be certified and MNDM only needs to acknowledge receipt after it determines that the Plan is compliant with the Code.

Implications of the Decision

The certified Closure Plan commits Falconbridge to taking the actions described in the Plan whenever Falconbridge ceases operations at the Montcalm Project.

Public Participation & *EBR* Process

Public consultation on the Closure Plan included a proposal on the Environmental Registry, and public notice under the *Mining Act* and other legislation. The company also held public information sessions in Timmins in July 2001 and September 2002. A copy of the proposed Plan was available for public viewing at the Sudbury and Timmins offices of the MNDM. An electronic version of the Plan was not available on the Registry.

The organization Northwatch was the only commentor on the proposed Plan. It raised several concerns including:

- Many of the design decisions for the mine had yet to be made as of early 2003 (when this proposal was posted), and therefore it was premature to create a Closure Plan.
- The required number of samples from the sulphide ore had not been taken.
- A high level of acid generation is anticipated which can mobilize metals causing adverse effects on aquatic ecosystems.
- The reliability and effectiveness of the proposed processes to separate acid generating material from waste rock and to prevent sludge from being mixed with acidic materials.
- Waste rock handling procedures were still being developed.
- Issues related to potential groundwater contamination have not been adequately addressed.
- Financial assurance was not sufficient.

Northwatch also expressed concern that approvals for the various aspects of the Montcalm Project are being done in a piecemeal manner without being subject to an overall review. Northwatch urged MNDM to delay its review of the Closure Plan until all permits and approvals could be reviewed together.

In its decision notice, MNDM indicated that, as the result of Northwatch's comments, Falconbridge was directed to amend the Closure Plan if aspects of its operations change.

SEV

MNDM made no mention in the package of information provided to the ECO regarding how its SEV helped to inform its decision. The ministry's SEV states that it will promote environmentally sustainable development which is informed by sound environmental planning. MNDM also advocates the importance of integrating social, economic and scientific considerations when making environmentally significant decisions.

Other Information

The Montcalm Project has been the subject of much debate and is described on pages 11-13 of the 2003/2004 annual report. An *Ontario Water Resources Act* instrument allowing discharge to the Groundhog River issued to Falconbridge in August 2003 prompted several leave to appeal applications, including an application from Northwatch, to the Environmental Review Tribunal. (For further information regarding these applications, refer to page 157 of the annual report and page 345 of the Supplement.)

ECO Comment

The ECO notes that MNDM has directed Falconbridge to amend the Closure Plan as changes regarding the mine's operation occur. This, in part, addresses Northwatch's concern that some design issues have not been resolved and that information is incomplete. However, the ECO is concerned that MNDM did not explain how it considered its SEV when making its decision. The soundness of a Closure Plan is an important aspect of ensuring that adverse effects caused by mining are addressed. Considering its SEV while reviewing a Closure Plan would reinforce the importance of MNDM's SEV commitment to minimize the long-term environmental effects of mining.

SECTION 5

ECO REVIEWS OF APPLICATIONS FOR REVIEW IN 2003/2004

NOTE: An allegation contained in an application may or may not have been proven to be an offence under the laws of Ontario or Canada.

MINISTRY OF AGRICULTURE AND FOOD

Review of Application R2002013:
Aquaculture in Georgian Bay – Nutrient Management
(Review Denied by OMAF)

Background/Summary of Issues

The applicants requested a review of the existing policies and regulations for open netcage aquaculture in Georgian Bay public waters as a result of concerns regarding:

- Water quality
- Environmental monitoring
- Nutrients from fish waste and uneaten food
- Escapement (escape of caged fish) and its potential genetic impact on native fish
- Enforcement and fines.

In support of their application, two substantial reports were provided by the applicants. Since the applicants raised concerns related to the policies and regulations of three ministries, the submission was handled as three separate applications. The ECO forwarded concerns about the policies and regulations for water quality and environmental monitoring to the Ministry of the Environment. Concerns regarding the policies and regulations for escapement, enforcement and fines were forwarded to the Ministry of Natural Resources. Lastly, the ECO forwarded the applicants' request for a review of the *Nutrient Management Act* (*NMA*) due to concerns about nutrients from fish waste and uneaten food to the Ontario Ministry of Agriculture and Food (OMAF). OMAF's handling of the request is discussed below. Please refer to pages 205-207 and 246-248 of the Supplement for a description of the responses from the other two ministries.

The applicants noted that the eastern shoreline of Georgian Bay is primarily used for recreational activities, as a source of drinking water and as a receiver of domestic sewage. However, a decline in walleye and bass yields, changes in water clarity, the appearance of zebra mussels and periodic high concentrations of *E. coli* have raised questions regarding the consequences of increasing development, fish farming and dredging in the area.

Open netcage aquaculture operations discharge fish waste directly into open water, which raises phosphorus levels in the water. The applicants note that phosphorus is a "key limiting nutrient" that, when elevated, can change an ecosystem in dramatic ways "by increasing primary production," i.e., increasing plant growth. Although studies indicate that total phosphorus (TP) for open Georgian Bay water is 3-5 µ/L, MOE uses 10 µg/L as the level at which aquaculture operations are required to take corrective action. The applicants believe that the lower level for TP should be used thereby ensuring that the ecosystem is not changed by elevated phosphorus levels. Since phosphorus is a nutrient, the applicants asked that OMAF consider including aquaculture under the *NMA*.

Ministry Response

OMAF failed to send a letter acknowledging receipt of the application, but did advise the applicants of its decision within 36 days of receiving the application. In its response on April 8, 2003, OMAF advised the applicants that it was denying their request for review on the basis that the *NMA* is not prescribed under the *Environmental Bill of Rights* and therefore not subject to an application for review. OMAF also noted that the *NMA* had not yet been proclaimed and that the regulations were still being developed.

ECO Comment

The ECO agrees that OMAF was justified in denying this application for review. Under the *Environmental Bill of Rights*, legislation that has not been prescribed, such as the *NMA*, are not subject to application for review. The ECO has urged OMAF several times to prescribe the *NMA*, but OMAF has not yet agreed. Furthermore, the *NMA* was not proclaimed at the time OMAF responded to the applicants. Since then, *NMA* has come into force and a regulation that is only applicable to livestock operations is now being phased-in. It is the ECO's understanding that OMAF intends to develop nutrient management regulations for aquaculture operations sometime in the future.

The ECO is concerned that OMAF failed to send an acknowledgement of receipt to the applicants within 20 days of receiving the application as required by s.65 of the *EBR*. OMAF, however, did advise the applicants of its decision within 36 days, which is in compliance with s.70 and s.71 of the *EBR*. The ECO urges OMAF to review its application-handling procedures to ensure full compliance with Part IV of the *EBR*.

In our 2000/2001 annual report, the ECO raised the same concerns as the applicants regarding the impact of nutrients from fish waste on the surrounding water quality and urged the government to "ensure that the aquaculture industry is sufficiently regulated to protect the environment." To date, no action has been taken. The ECO continues to believe that regulations are required and urges OMAF to consider the concerns raised by the applicants when it develops the regulations.

MINISTRY OF THE ENVIRONMENT

Review of Application R0266:
Review of Regulations Requiring Refillable Containers for Carbonated Soft Drinks
(Review Undertaken by MOE)

Background/Summary of Issues
Ontario has hosted a spirited public policy debate on refillable and recyclable soft drink containers (SDCs) since the early 1970s. Hundreds of briefs and reports have been written, dozens of meetings held, a number of civil and criminal trials started, and several applications launched under the *Environmental Bill of Rights (EBR)*.

In March 1995, two applicants filed an *EBR* application for review requesting that Regulation 340, R.R.O. 1990 (Container Regulation) and Regulation 357, R.R.O. 1990 (Refillable Containers for Soft Drinks) under the *Environmental Protection Act (EPA)* be replaced with policies that promote effective multi-material recycling programs and packaging stewardship in general.

Regulations 340 and 357 were designed to work together to promote reuse of SDCs and curbside recycling programs such as the Blue Box system (BBS). They were established in 1985 after a multi-stakeholder group studied container re-use and recycling issues and made recommendations to the Ministry of the Environment. Regulation 357 requires that soft drink companies and retailers sell carbonated soft drinks in refillable containers. Regulation 340 provides an exemption to the ban on non-refillables, when certain conditions, including a minimum refillable sales ratio, are met. The 1985 regulations replaced a 1978 voluntary agreement between the Ontario government and the soft drink industry which stated that MOE would not enforce laws and regulations it had passed in 1976 requiring retailers to phase out non-refillable SDCs as long as the industry sold approximately 75 per cent of its product in refillable SDCs.

MOE's September 1985 press release announcing creation of the BBS stated that "all non-refillables must reach a 50 per cent recycling rate within three years" as of September 1985. MOE hasn't enforced the regulations since 1991. As a result, refillable SDCs have almost vanished in Ontario, though they thrive in some other jurisdictions.

The applicants felt that the 1985 refillable SDC regulations treat the soft drink industry unfairly, and that the regulations damaged the environment through negative impacts on solid waste diversion and energy use. The application for review included a range of promotional and educational material from the Canadian Soft Drink Association (CSDA), a national industry association, as well as two consulting studies.

One study was prepared by Michael Hare, a University of Toronto professor, for Ontario Multi-Material Recycling Inc. (OMMRI) in 1991 and the second was a research report on the energy profiles on various containers prepared for OMMRI in 1992.

The 1991 consulting study (the "Hare report") for OMMRI provided evidence of negative environmental impacts associated with the 750 ml. refillable glass container, which in the 1970s became the most popular SDC in Ontario. The Hare report assumed, based on American studies, that about 5 per cent of refillable SDCs are not refilled or recycled and end up being landfilled. Consequently, the Hare report estimated that landfilled 750 ml. refillable glass SDCs were creating 54,100 cubic metres of solid waste per 1000 litres of product delivered, assuming that the glass containers don't break in landfills. In contrast, the study suggested that non-refillable 2 litre polyethylene terepthalate (PET) plastic containers and aluminum cans would create only 52,400 and 23,500 cubic metres of solid waste respectively per 1000 litres of product delivered because the containers were being recycled in the BBS and they were easily compacted when deposited in landfills. The Hare report also pointed out that the growth of the Blue Box system between 1986 and 1990 had been steady and estimated that 9,570 metric tonnes of non-refillable SDCs were recycled in the BBS in 1990. Moreover, the Hare report pointed out that a total of 292,000 metric tonnes of glass, metal, plastic and newspapers were collected in 1990. In 2002, Waste Diversion Ontario estimated that approximately 725,000 tonnes of recyclable materials (including paper, glass and other materials) were collected in the BBS.

The Hare report also estimated that in 1985 non-refillable SDCs generated more than 59 thousand metric tonnes of solid waste each year and refillables generated slightly more than 10 thousand metric tonnes (assuming that 5 per cent of refillable containers were landfilled). At the time, refillable soft drinks represented 35 per cent of total Ontario sales by volume (229 thousand kilolitres) out of an estimated 655 thousand kilolitres per year. By 1999 soft drink sales in Ontario had reached more than 1.3 million kilolitres per year and refillables represented less than one per cent of total sales. Even though soft drink sales have roughly doubled in the past 20 years, with the growth of light-weighting of recyclable SDCs and the expansion of the BBS, it appears that the annual rate of solid waste generated for disposal by SDCs has probably remained remarkably steady in the past decade, in the range of 60-80 thousand metric tonnes per year.

The second report on energy profiles noted that shipping refillable glass bottles requires large quantities of energy and requires more energy than shipping lighter, non-refillable containers because the empty refillable containers can be up to 40 times heavier than the equivalent volume in plastic PET bottles or aluminum cans. The applicants went on to observe that this means "refillable glass containers use up to twice the energy consumed by recyclable containers for every 1,000 litres of product sold."

The applicants also argued that the regulations cost the industry more than $300 million per year in lost sales and unnecessary costs, and hinder investment in Ontario, citing the CSDA materials submitted with their application. The largest portion of this $300 million relates to lost opportunity costs (if refillable shelf space were allocated to faster-moving one-way containers), plus the costs associated with maintaining an unnecessary inventory or float of refillable bottles. (This issue no longer is relevant because the soft drink companies no longer maintain a large float of refillable bottles and retailers no longer devote shelf space to refillables.)

The applicants also said that consumers don't like refillable soft drink containers. Indeed, they pointed to CSDA polling research suggesting that consumers see the deposit as an extra cost, even though it is refunded, prefer the at-home Blue Box system and worry about the breakability of glass refillables.

In addition, evidence provided by the applicants noted that, as of 1995, Ontario's beverage container waste management laws and policies encouraged the use of both refillable and recyclable containers for approximately two-thirds of the 6 billion alcoholic and non-alcoholic beverage servings sold every year but did not treat all beverage producers fairly. At the time of the application in 1995, the other third of non-alcoholic beverages sold in Ontario – primarily juices and bottled waters – were not subject to refillable requirements and these beverage producers were not required to support the BBS. The applicants also suggested that the regulations conflict with the BBS because valuable non-refillable aluminum soft drink cans are needed to fund the BBS and these cans would not be deposited in the BBS in sufficient numbers if the refillables regulations were enforced or expanded.

Ministry Response

The MOE agreed in 1995 to review Regulations 340 and 357 in the broader context of overall program streamlining and planned to report its decision by early 1997. In a July 1996 public consultation paper on regulatory reform called *Responsive Environmental Protection* (REP), the ministry said that Ontario's refillable SDC regulations don't work. Despite the MOE's statement in REP that the existing regulations didn't work, staff at the ministry who reviewed the regulations concluded that some regulation was still needed to require the use of recyclable or refillable SDCs because the regulations were one of the few MOE powers available to leverage the soft drink industry to continue to provide financial support for the BBS. When the ministry invited public comment on scrapping the regulations in the early fall of 1996, many people said that recycling non-refillable PET containers, the plastic most often used for soft drink bottles, through the BBS is expensive and inefficient. Some argued that refillable containers are the better choice – environmentally and economically – but didn't necessarily provide strong scientific evidence in support of their comments on the MOE's proposal. It appears that further formal consultations on the regulations were suspended in early 1997.

In its 1997 annual progress report prepared for the ECO, MOE stated that the ministry has been seeking stakeholder views on alternate approaches for promoting refillable containers through its consultations on regulatory reform. In addition, MOE had referred the related issue of funding the Blue Box system and clarifying roles and responsibilities in the province's solid waste management system to the Recycling Council of Ontario (RCO). The RCO, in turn, "assembled a broad range of stakeholders to develop options to address product stewardship issues," specifically to address the sustainability of the BBS. The ministry also stated it will "consider the RCO's recommendation with respect to this issue."

As of 1998, MOE was still considering stakeholder views on alternate approaches for promoting the use of refillable containers through the ministry's regulatory review exercise. MOE told the ECO that due to the complexity of this issue, the government was still considering all options for managing soft drink and other beverage containers in the province and no decisions had yet been made on the refillable regulations.

In August 2000, MOE told the ECO that the ministry had established the Waste Diversion Organization (WDOrg), a partnership including representatives from industry, provincial and municipal governments, and a non-governmental organization, with a commitment of $14.5 million from its members to help fund municipal BBS and other waste diversion programs. MOE also stated that, "in recognizing consumer preferences, MOE has moved to deal with the non-refillable containers through the BBS. The refillable soft drink container regulations are closely linked to the BBS since the regulations' refillable requirements were related to recycling rates and prompted the initial industry funding support for the [Blue Box system] in 1985. The regulations will be reviewed after testing the effectiveness of the new organization. No enforcement of these regulations will occur while this review is underway."

The work of WDOrg eventually led to passage of the *Waste Diversion Act, 2002* (*WDA*) which received Royal Assent on June 27, 2002. The *WDA* creates Waste Diversion Ontario, a non-governmental agency responsible for developing waste management plans for a variety of recyclable, compostable and re-usable materials. The first material designated by MOE for developing a waste management plan under the *WDA* was Blue Box waste.

With the passage of the *WDA*, it appeared that MOE was trying to bring the 30-year debate on refillable SDCs to an end. In late April 2003, MOE posted a proposal notice on the Registry stating that it intended to repeal the refillable SDC regulations now that the *WDA* had been enacted. In its proposal notice, MOE stated that "regulations are outdated and unworkable, and there is clear consumer preference for recyclable over refillable containers for carbonated soft drinks. Moreover, the [*WDA*] puts a mechanism in place to ensure that waste diversion will be enhanced in Ontario, including diversion of carbonated [SDCs]." The MOE also noted that the ministry had said that it would address the soft drink regulations once a sustainable funding mechanism for the BBS is approved.

In early May 2003, the ECO urged the MOE to notify the applicants that it had completed its review, and was proceeding with the repeal of the regulations. MOE did notify the applicants in mid-May 2003. In December 2003, MOE approved a funding mechanism for the BBS under the *WDA*. However, as of May 2004 the refillable SDC regulations had not yet been repealed. It is noteworthy that the RCO stated in its May 2003 submission on MOE's proposal to revoke the regulations that "until such time that ambitious material specific or product specific targets, consistent with other Canadian provinces, are achieved, the Recycling Council of Ontario does not support the repeal of Regulations 357 and 340."

During the eight-year review period, MOE also undertook certain actions to preserve its special relationship with the soft drink industry. In 1995, the Toronto Environmental Alliance (TEA) launched a private prosecution alleging that the Coca-Cola Company Ltd. was failing to comply with the requirement in Regulation 340 that soft drink companies sell 30 per cent of soft drinks in refillable bottles. With the support of the MOE, in December 1996 a Crown prosecutor for the Ontario government applied to take over the TEA private prosecution and promptly withdrew the charges against the company. At the time, the Crown prosecutor stated that the MOE had been working with the soft drink industry since 1991 to develop a new deal to fund the BBS and that the MOE had agreed not to enforce the law while the two sides tried to work out the deal.

ECO Comment

MOE's April 2003 proposal to revoke Regulations 357 and 340 appeared to close an important chapter of the debate but it leaves other issues unresolved. Moreover, it is unclear as to when the MOE intends to actually repeal the refillable SDC regulations. To shed further light on some of the history and the nature of the issues, the ECO has prepared a separate history of the soft drink refillable issue. (See pages. 363-366 in this Supplement)

The ECO has been reviewing MOE decisions on the refillable soft drink regulations and the Blue Box system since 1995. The structure of the SDC regulatory system is complex because Regulation 340 provides an exemption to the ban on non-refillable SDCs when certain conditions are met. In sum, Regulation 340 sets out recycling targets that the BBS is required to meet if the soft drink companies wish to reduce the refillable share of the marketplace. If the recycling rate is less than 50 per cent for three quarters of a year, the required refillable share is 40 per cent. The refillable requirement decreases by 5 per cent for every 10 per cent recycling rate increase. Brand owners are required to submit auditor's reports each month verifying sales in refillable SDCs. Moreover, section 8(2) of Regulation 340 stipulates that "no person shall sell carbonated soft drinks in a non-refillable container that contains a material that is recycled at a recycling rate that is less than 50 per cent" 18 months after the container type is first used.

Despite these stipulations, Regulation 340 fails to define clearly how MOE should interpret whether an increase in recycling rates has occurred. The MOE was required by Reg. 340 to establish the Recycling Advisory Committee (RAC) to advise the minister on compliance with the regulation. While RAC was dominated by SD brand owners and other representatives of industry, it also had few representatives of environmental groups; however, its legitimacy was repeatedly challenged by environmental groups and other stakeholders.

Even though the recycling targets set out in Regulation 340 were not achieved for any non-refillable SD container types, RAC recommended in 1988 that the refillable SDC requirement should be lowered from 40 per cent to 30 per cent and MOE accepted this recommendation. In its deliberations, RAC noted that SD brand owner compliance with Reg. 340 requirements is entangled with a myriad of factors related to the operation of the BBS: funding of the BBS, consumer behaviour and attitudes about recycling, MOE policies and laws, local 3Rs programs and policies, etc. In retrospect, it could be argued that MOE should not have agreed to a regulatory scheme so closely linked to factors outside of the direct control of brand owners and companies the ministry sought to regulate. While the soft drink brand owners provided funding for capital expenses, research and lobbying related to establishment of the BBS serving single family homes and also agreed to use aluminum cans to support the BBS, they could not control what happened in the industrial, commercial and institutional (IC&I) sectors (which includes privately owned apartments and condominiums) and they could not directly control the behaviour of consumers. Not surprisingly, several judges and justices of the peace refused to convict soft drink companies for failing to comply with certain conditions of Regulations 357 and 340. Internal memos prepared by MOE lawyers and policy staff in the late 1980s and early 1990s acknowledged that the 1985 refillable regulations, as written, would prove difficult to enforce.

Disputes about compliance with Regulations 340 and 357 motivated RAC to propose the concept of "interpretative compliance" as a way to get around strict application of the regulations. The essence of this proposal was that MOE should deem that the soft drink brand owners were in compliance with the refillable regulations a large portion of Ontario residents living in single family dwellings were being serviced by the BBS even if these residents were not necessarily depositing their recyclable SDCs in the BBS and the companies were not meeting the actual recycling requirements of the regulations. The MOE accepted this proposal in early 1990; however, the new government elected in September 1990 initially rejected the concept of "interpretative compliance" and decided that it wanted to try and make the companies comply with Regulations 340 and 357. These efforts were unsuccessful and, in June 1991, MOE began to negotiate with the soft drink industry on a new long-term funding model for the BBS. The refillable regulations were maintained as a lever to ensure that soft drink brand owners and companies continued to co-operate with MOE in its efforts to revamp the BBS. However, MOE ceased to administer the regulations in 1991 and the soft drink brand owners stopped supplying audited reports on SD sales to MOE in 1993. Moreover, RAC was disbanded by MOE in the summer of 1990, and replaced by a new advisory committee called the Waste Reduction Advisory Committee (WRAC).

In January 1995, a Toronto-based environmental group applied for an *EBR* investigation alleging that two companies had contravened the refillable soft drink regulations. In March 1995, two Ontario residents applied for a Review of the same regulations. In response to the application for investigation, MOE found that the two companies had contravened the regulations. However, the ministry did not lay charges, saying it would be inappropriate to prosecute because the ministry and industry were in the middle of working on a solution. The MOE also said it was waiting for two SD industry studies of the issue originally promised to the ministry in 1993. To date, the MOE has never admitted receipt of these SD industry reports, released them to the public or provided them to the ECO.

In our 1994/1995 annual report, the ECO recommended that the Ministry of Environment announce what changes it intended to make to Ontario's SD refillable regulations, and added that MOE should start enforcing the refillable SD regulations in the absence of such change. The fact that MOE refused to prosecute companies that contravene the regulations for more than 12 years and simultaneously failed to amend the regulations created a strange situation for all stakeholders and undermines the concept of the rule of law.

In terms of MOE's handling of the review, the eight-year delay in completing this review was an unacceptable abuse of process by the MOE and clearly contrary to the goals and purposes of the *EBR*. While the ECO is pleased that the MOE finally took action on this file in April 2003, the quality of the analysis presented by the MOE in support of its decision to revoke the regulations was disappointing.

Some of the issues raised by the applicants have subsequently been addressed by MOE, Waste Diversion Ontario and Stewardship Ontario (SO). For example, at the time of the application in 1995, most of the brand owners of other beverages sold in Ontario – primarily juices and bottled waters – were not subject to refillable or deposit requirements and were not required to provide support for the BBS. However, these beverages are primarily packaged in recyclable materials collected in the Blue Box system and the stewards of these containers must now contribute to support of the BBS under the Blue Box Program Plan (BBPP) developed by SO under the WDA. (For a review of the BBPP, see pages 112-128 in this Supplement.) However, a handful of issues that were raised by this application remain unresolved and are troubling for the ECO. Some of these are discussed in greater detail below.

Do Refillable Beverage Containers Harm the Environment?

The applicants alleged in their application that refillable containers cause harm to the environment. In contrast, many environmental groups assert that refillable beverage containers are beneficial for the environment. The ECO has tried to sort out the various claims made by stakeholders. Analyzing the environmental and energy performance of non-refillable and refillable SDCs is extremely complex, and requires consideration of dozens of factors including: the type of container used, how many trips a refillable container makes, the distances that the containers travel, and bottling infrastructure.

Under the current BBS, non-refillable aluminum, glass, and plastic containers are used once and then discarded or recycled. Aluminum cans collected in the BBS then are recycled into other aluminum cans and products. Likewise, glass containers can be recycled into glass containers of the same colour. Plastic containers are usually recycled into other types of products such as plastic picnic tables, fabrics and other consumer items. Current estimates suggest that approximately 40 to 50 per cent of non-refillable SDCs are recycled in the BBS and the rest end up landfilled.

In contrast, refillable containers have intuitive appeal to many observers. Experts - including economists, government officials, and environmental groups - have argued for more than 30 years that a great deal of the solid waste that winds up in landfills is packaging waste. European studies suggest that used beer, milk, soft drinks, mineral water, fruit drinks, wine and spirits beverage containers make up between four and six per cent of the solid waste generated by householders for re-use, recycling, or disposal. Many people advocate a return to refillable beverage containers and deposit-return systems to reduce the quantities of this waste that are sent to disposal.

The applicants pointed to evidence in the 1991 Hare Report which supported the theory that large quantities of refillable glass containers are not refilled or recycled in the BBS and end up being landfilled. If true, the Hare theory would mean that refillable SDCs would generate more solid waste for disposal than some non-refillables SDCs. In 1997, the ECO reviewed the evidence contained in the Hare Report, examined more than a dozen peer-reviewed studies and consulted outside experts. Most studies and experts discounted the assumption in the Hare Report that approximately 5 per cent of refillable glass SDCs are not refilled or recycled. Indeed, evidence reviewed by the ECO shows that a very high percentage of refillable beverage containers (97 - 99 per cent) are returned for re-use if the refillable system is operated effectively and properly promoted. Moreover, some types of refillable glass and plastic bottles can be used 25 times or more before being recycled or landfilled. The ECO estimates that a very high percentage of those glass refillabie SDCs that are not re-used would be placed in the BBS by most consumers. In any case, the Hare Report didn't examine the full environmental performance of SDCs and compare it to other new containers such as PET refillables.

To ensure a high return rate, refillable bottle systems almost always rely on a deposit-refund system. Without this economic incentive, most consumers would not bother to return their bottles and instead would deposit them in the BBS or in their regular garbage. Evidence reviewed by the ECO indicates that U.S. states and eight Canadian provinces with deposit-refund systems achieve higher SDC recovery rates. According to a June 2003 report by CM Consulting, recovery rates for non-refillable SDCs in provinces with deposit-refund systems ranged from 67 to 83 per cent in 2001-02. The same study reports return rates for refillable glass beer bottles ranged from 92 to 100 per cent in 2001-02. As reported in our 1998 annual report, more than 98 per cent of beer bottles in Ontario (with a 10 cent/bottle deposit) are returned to the Beer Store for refilling and recycling. The studies reviewed by the ECO show that the return rates associated with deposit systems correlate with the size of the deposits charged; higher container deposits ensure higher rates of recovery.

Life cycle assessments (LCAs) evaluate how a product affects the environment throughout its life and provide some insight into the environmental pollutants associated with various types of SDCs. A review of 38 LCAs of refillable and recyclable SDCs undertaken by ECO staff in 1997 found that three-quarters of those with adequate data for review (13 of 17) favoured refillable SDCs. For example, most LCAs suggest that dust, sulphur oxide, hydrocarbon, and water pollution emissions are all lower when glass refillable containers are used compared to other non-refillable containers. However, many of these studies are dated and don't reflect current economic and technological conditions in Ontario. Another problem that arises is it is difficult to evaluate the relative harm to the environment caused by the release of different pollutants such as volatile organic compounds, dust or sulphur oxides. Moreover, the durability of a refillable beverage container also affects how environmentally friendly the package is. Both glass and plastic refillables have to be made with about twice as much material as non-refillable bottles to withstand repeated reuse.

The nature of distribution systems also has a significant impact on the environmental performance of refillable and non-refillable containers. For example, up until the late 1970s many northern and rural communities in Ontario had local bottling plants where local water was added to syrups and the mixture was then carbonated and packaged. Implementation of the BBS allowed the soft drink companies to consolidate their operations and close most of the local plants, thus depriving these communities of local jobs and sucking more money out of their communities, money that was previously partly retained in the communities. Since the late 1980s the large soft drink companies operating in Ontario have packaged nearly all their soft drinks at their operations in the Greater Toronto Area (GTA) and ship their products, the liquid portion of which is 99 per cent water, to urban, rural and northern communities. Shipping these water-laden beverage containers to remote communities consumes vast quantities of fuel, and has significantly eroded the life-cycle performance of beverage containers, especially when the current system is compared with the refillable systems that were in place prior to 1985.

However, the ECO agrees with the applicants that shipping refillable glass containers from Toronto to Thunder Bay and back again in a continuous loop would consume far more energy than one-way distribution to retailers and then SDC recycling in the current BBS. Indeed, the Fraunhofer Institute in Germany released a study in the early 1990s showing that refillable glass bottles release more nitrogen oxides than non-refillable containers if the trippage distance traveled by the bottles is more than 600 kilometres. However, a very different environmental performance picture would emerge if refillable PET containers were substituted for refillable glass bottles.

Table 1. Three air pollutants (uncontrolled) generated during the manufacture of virgin glass, PET, and aluminum for the delivery of 10,000 L of beverage, in non-refillable and refillable soft drink containers (in kg, rounded to the nearest tenth)[1]

	Volatile organic compounds	Sulphur oxides	Total suspended particulates
Soft Drink Container (473 ml, 16 fluid ounces)			
Aluminum can	2.0	46.1	122.1
Non-refillable glass bottle	17.9	10.7	415.3
Non-refillable PET bottle	24.6	15.9	1.5
Refillable glass bottle			
8 trips	5.8	3.5	133.4
25 trips	1.3	0.7	30.2
Refillable PET bottle			
8 trips	6.1	3.9	0.36
25 trips	2.0	1.3	0.14

Source: Saphire, Case Re-Opened (1994), p. 118. See also footnote below.

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[1] This is based on Table 4-5 in David Saphire, Case Re-opened: Reassessing Refillable Bottles (1994). New York: Inform, p. 118. Figures reported in this table have been converted to metric measures. See the original for the results in imperial measures. The results indicate the pollution that would be released *in the absence of control measures*. Some pollutants are more easily controlled than others (for example, suspended particulates can be caught by filters in scrubber units – it is more difficult to control volatile organic compounds and sulphur oxides). This table is based on data originally presented in: Tellus Institute, CSG/Tellus Packaging Study: Assessing the Impacts, Prepared for the US EPA, May 1992.

The LCA studies reviewed by the ECO strongly suggest that certain types of refillable containers such as refillable PET have a significantly lower environmental impact than some non-refillable containers. A summary of the key data from a 1992 study prepared for the United States Environmental Protection Agency by the US-based Tellus Institute, a leading environmental consulting firm, is presented in Table 1.

Glass bottles have many advantages and disadvantages. If they are reused between 8 to 10 times in a local refillable distribution and collection system (and the bottles travel less than 300 km per trip), environmental benefits can result from lower energy use because less energy is consumed washing a bottle than making a new one. A highly regarded 1989 study found that glass bottles, reused just eight times, used the least energy of nine different containers (both non-refillable and refillable) considered. Washing used containers for refillable operations appears to release fewer toxins than making new containers. However, washing operations consume large quantities of water and communities facing water shortages may not support refill operations. Glass also breaks easily, and can injure consumers and workers who fail to handle the containers carefully.

Non-refillable glass bottles compare poorly to other containers on environmental and energy criteria, as suggested by Table 1. One 1999 Japanese study estimated that sending a non-refillable glass container to a disposal facility after a single use consumes at least five times the energy that would be required to clean, ship and re-use a refillable glass container if it is re-used about eight times. In addition, contamination of glass collected in the BBS has reduced the quality of the glass that is available to companies that recycle the glass into new products and lowered prices for the glass collected in the BBS.

Aluminum containers also have important strengths and weaknesses. In 2003, the World Watch Institute estimated that making 1 million tonnes of aluminum cans from virgin materials requires 4.95 million tonnes of bauxite ore and the energy equivalent of 35 million barrels of crude oil. Recycling the cans, in comparison, saves all of the bauxite and more than 75 per cent of the energy, and avoids production of about 75 per cent of the pollutants. As World Watch states, recycling just one aluminum can save enough electricity to run a laptop computer for 4 hours. The aluminum industry also significantly affects global warming. One 1992 Environment Canada report estimated that the aluminum sector in Canada was producing GHGs equivalent to six per cent of Canada's entire output of carbon dioxide because the manufacturing process emits perfluorocarbons (PFCs) and the impact of PFCs is 6500 to 9200 times higher than that of carbon dioxide depending on the PFC discharged. The 1992 Environment Canada report also stated that Alcan produced one to two kilograms of the tetrafluoromethane (a PFC) and 0.1 to 0.2 kilograms of the PFC hexafluoethane (also a PFC) for every tonne of aluminum the company produces. Since the mid 1990s, Canadian aluminum manufacturers have made significant reductions in their discharges of these GHGs because they have shifted production to newer facilities. For example, in 2003 Alcan reported that its worldwide operations had reduced their GHG emissions by approximately 1.45 million tonnes per year in 2001 and 2002, an overall cut of 15 per cent compared to 1999 levels.

PET plastic recycling presents complex issues as well. The production of the plastics used in PET bottles produces 28 to 40 kilograms of organic pollutants per tonne produced and the plastics industry is also one of the largest industrial contributors to global warming. In 2003, the

World Watch Institute estimated that making 1 million tonnes of plastic bottles from virgin materials (petroleum and other fossil fuels) generates an estimated 732,000 tons of climate-altering greenhouse gases. While plastic bottles made from PET can be recycled into many products, including beverage bottles, plastic strapping, fleece jackets, sleeping bags, and carpets, this process does have technical limitations because of cascading effects (i.e., plastic fibres degrade and cannot be recycled more than 4-5 times because the recycling process changes plastics). Moreover, many municipalities have been unable to secure long-term markets and recover their collection costs for most plastics. Because of the low value of used PET plastic, it is usually cheaper to landfill PET than to recycle it. Estimates prepared for the WDO in 2003 using activity-based costing models suggest that the cost of recycling non-refillable PET bottles ranges from $780/tonne to $850/tonne. Considering that PET is made from a non-renewable resource, and that landfills have substantial environmental effects, few suggest that municipalities seriously consider landfilling soft drink containers rather than recycling them. However, some experts advocate incineration of these materials.

One issue that has been raised several times in the past eight years is whether refillable plastic bottles could be used instead of glass. In our 1996 annual report, the ECO urged MOE and the Ministry of Consumer and Commercial Relations (as it then was, now called the Ministry of Consumer and Business Services) to review these new refillable technologies and work with the Ontario beverage industries to implement them. The MOE and the Ministry of Consumer and Business Services (MCBS) never undertook these studies. In some European and South American nations, refillable PET and polyethylene naphalate (PEN) containers have been used for beverages for more than 15 years. One soft drink brand owner reported in the mid 1990s that some of its refillable PET bottles in Europe were being refilled 25 times. PEN is a superior material for plastic refillables, and might be refilled twice as many times as refillable PET containers.

Refillable PET and PEN containers cost more than non-refillable PET containers on initial purchase. But when costs are amortized over 12-25 consumer trips, refillable PET and PEN containers cost less than non-refillable PET containers.

Research conducted by the ECO in 1997 shows that using refillable PET and PEN containers in Ontario would not require major modifications to current filling equipment. Using plastic refillables instead of non-refillables would not eliminate impacts of plastic production, but it would certainly reduce the new plastic requirements of the beverage industry. That would reduce the total environmental impact of packaged soft drinks, bottled waters and juices.

In summary, most studies reviewed by the ECO disagreed with the assumption in the Hare Report that 5 per cent of refillable glass containers are not refilled or recycled, suggesting that a large number not returned for deposit would be directed to the BBS. Moreover, the claim that non-refillables have a superior environmental performance compared to refillable glass containers does not seem to be supported by the evidence reviewed by the ECO and does not reflect the environmental performance of refillable PET SDCs.

Would Refillable Containers Hurt the Blue Box System?
The applicants suggest refillables and deposits would undermine the BBS. Based on evidence from other North American jurisdictions, it appears that a deposit-based system would probably remove 70 to 85 per cent of aluminum SDCs from the BBS, depending on the size of the deposits. This could have serious effects on the viability of the BBS as currently operated because aluminum cans have generated very large revenues for municipal recycling programs since 1994. Indeed, the CSDA estimated in 1996 that aluminum provided 40 per cent of recycling revenues in Ontario. In effect, the soft drink industry has subsidized the BBS and other stewards of BBS materials for at least 10 years. However, there is no legal requirement in the WDA or the BBPP that the soft drink industry continue to use aluminum cans. In the past, there have been indications that eventually the soft drink industry intended to switch back to cheaper container materials like PET and thin-walled steel. Moreover, under the *WDA* a switch to a less expensive container material would likely mean that soft drink brand owners would lose the credits they now receive from the WDO and they would be required to subsidize the collection of their containers and other stewards would probably be required to provide a greater portion of financial support for the BBS.

Other research reviewed by the ECO suggests that refillables and deposits would not undermine the Blue Box system and these systems work together in many North American jurisdictions. On the contrary, there is evidence that a Blue Box system and a deposit-refund system for refillables can work together to generate higher rates of waste diversion. For example:

- Many materials (glass, PET, boxboard, fine paper) go into the BBS. A deposit-refund system on certain containers such as refillable PET would free up time and resources to allow the BBS collect and process other materials.

- Some people who are willing to forgo deposits will continue to put their used beverage containers in their Blue Boxes. Redemption of the deposits on these containers will generate revenues for municipalities and recycling program operators.

- A deposit-refund system can pave the way for stronger recycling measures that encompass more materials and collect beverage containers from commercial and industrial settings, where many are used. Moreover, deposits on glass bottles such as LCBO bottles would produce high quality glass supplies for manufacturing.

- Several Canadian provinces, e.g., Nova Scotia, British Columbia and Alberta, operate both curbside recycling systems in urban centres and deposit-refund systems.

- Private and public depots and reuse centres are already established in some parts of Ontario and this trend should be encouraged. These depots, reuse centres and other buy-back centres handle recyclables that cannot go in the Blue Box. Handling fees and other revenues from used beverage containers could help establish a funding base for these depots and buy-back centres.

A 1993 report to the U. S. Congress states that local governments would divert more solid waste from disposal for less money per tonne if both a deposit/return system and a curbside collection program were in place.

Nevertheless it appears that a deposit-based system would probably remove 70 to 85 per cent of aluminum SDCs from the BBS if deposits were placed on all SDCs and this could have significant effects on how much other stewards will need to pay towards operation of the BBPP. Thus, it might make sense for the Ontario government to gradually phase out the use of non-refillable PET and concurrently phase in refillable PET SDCs.

Would Consumers Accept Refillable SDCs?

The success of refillable containers depends in part on consumer interest and acceptance. The applicants suggest that consumers no longer accept the idea of refillable soft drink containers.

In the past ten years Ontarians have bought less than two per cent of their soft drinks in refillable containers. However, not many stores carry refillable bottles or display them. Research shows that, per unit, refillable soft drinks usually cost 30-40 per cent more than drinks in recyclable containers. When there were sales on soft drinks in the early 1990s, the price differential between refillables and non-refillables at some retailers often increased to between 50-60 per cent.

However, several polls conducted in the early 1990s suggest that consumers will buy refillable SDCs through a deposit-refund system if the containers are competitively priced, readily available and easy to return. In one such survey, consumers identified "the refillable glass container as the environmentally best choice," and said, "Encouragement of greater use of refillables ... lay in public education, price differentials and government intervention outlawing non-refillables." It is noteworthy that one consequence of the shift to non-refillable SDCs is that the price of soft drinks has declined relative to milk and juice, allowing, in the past two decades, soft drink companies to gain a larger "share of the stomachs" of Canadian consumers.

In another study:

- 65 per cent of respondents thought returning SDCs for refilling was environmentally preferable.
- 88 per cent of respondents thought deposit-refund systems reduce SDCs going to landfill.
- 88 per cent of respondents thought offering refillables at a cheaper price would increase sales.

In March 1997, Informa Market Research surveyed Metro Toronto residents on behalf of Metro Works. With respect to deposit-refund systems:

- 75 per cent of respondents either strongly (42 per cent) or mildly (33 per cent) supported a deposit-refund system.
- Nearly 60 per cent of respondents did not think that a deposit-refund system would add too much to their grocery bill.
- 52 per cent of respondents did not think a deposit-refund system would negatively affect the Blue Box system.

The ECO was unable to identify recent polling data for Ontario. However, the data reviewed above supports the contention that deposit-refund systems and refillable SDCs enjoyed a modest level of public support in Ontario until the mid 1990s. The ECO suggests that refillable PET SDCs would likely enjoy greater popularity and support than refillable glass SDCs providing that some of the costs savings associated with re-use of the refillable PET SDCs were passed on to consumers.

The Need to Increase Recovery Rates
One troubling aspect of the Blue Box System (BBS) is that approximately one thousand million aluminum soft drink (SD) cans are not recycled by Ontarians each year and are being sent to landfills and other disposal facilities.

The recovery and recycling of aluminum cans are important for several reasons. First, recycling these containers conserves very large amounts of energy and raw materials. Second, the extraction and processing of the raw materials needed to make new cans release large quantities of pollutants and greenhouse gases (GHGs), pollution that can be prevented if the cans recycled. In 2003, the Worldwatch Institute estimated that making 1 million tonnes of aluminum cans from virgin materials requires 4.95 million tonnes of bauxite ore and the energy equivalent of 35 million barrels of crude oil. Recycling the cans, in comparison, saves all of the bauxite and more than 75 per cent of the energy, and avoids production of about 75 per cent of the pollutants. As Worldwatch states, recycling just one aluminum can save enough electricity to run a laptop computer for 4 hours. The aluminum industry also significantly affects global warming. One 1992 Environment Canada report estimated that the aluminum sector in Canada was producing GHGs equivalent to six per cent of Canada's entire output of carbon dioxide because the manufacturing process emits perfluorocarbons (PFCs) and the impact of PFCs is 6500 to 9200 times higher than that of carbon dioxide depending on the PFC discharged. Since the mid 1990s, Canadian aluminum manufacturers have made significant reductions in their discharges of these GHGs because they have shifted production to newer facilities. For example, in 2003 Alcan reported that its worldwide operations had reduced their GHG emissions by approximately 1.45 million tonnes per year in 2001 and 2002, an overall cut of 15 per cent compared to 1999 levels.

Initially, aluminum SD can recovery rates for the BBS were very low. One 1989 study estimated that only five per cent of aluminum SD cans sold in Ontario were recycled in the BBS. However, there were steady gains throughout the early and mid 1990s and, in our 1998 annual report, the ECO approvingly cited a study stating that approximately 35 per cent of cans sold in Ontario were recycled in the BBS in 1997. In contrast, most Canadian jurisdictions with deposit-refund systems regularly capture 65-85 per cent of cans and other SD containers sold and some beverage container deposit-return systems recover much more. In 2002, the Brewers of Ontario reported that more than 91 per cent of the beer cans and 98 per cent of beer bottles sold at the Beer Store chain it runs were returned for deposit.

Despite recent improvements in recovery rates, Waste Diversion Ontario (WDO) estimates, based on audits of residential garbage, that only 42 per cent of aluminum SD cans in 2002 were recovered in the BBS. This means that approximately one billion cans worth about $25.5 million escaped collection in the BBS and may have ended up in landfills. The manufacturing of rolled-aluminum sheet to make those cans is equivalent to 900 billion watt-hours of energy, and the lost energy would equal the total output required to power 125,000 Ontario homes for one year. In addition, about 54,000 tonnes of GHG emissions could be avoided if all of these cans were recycled.

Drawing on historical data for Ontario SD container sales, the ECO estimates that between 9 and 11 billion aluminum cans produced in the residential and the industrial, commercial and institutional (IC&I) sectors were sent to disposal facilities by Ontarians between 1994 and 2003. Meanwhile Michigan state, which has had a deposit-refund system for containers since 1976, passed legislation in March 2004 allowing inspectors to ban imports of solid waste from Ontario if the shipments contain large quantities of recyclable containers and in May 2004 secured additional resources from the US federal government to begin enforcing this law beginning in October 2004.

There are many factors that partly explain why the Ontario BBS has never achieved the high SD container recovery rates that were predicted in 1985 when the BBS was formally announced by the MOE. As reported in the ECO's 2001/2002 annual report, recycling programs in the IC&I sectors (including apartment building) are underdeveloped and, in some cases, non-existent, in contravention of O. Regs. 102/94 and 103/94 under the *Environmental Protection Act*. Some experts also point out that away-from-home consumption of soft drinks has increased significantly in the past decade and only a small proportion of these containers is recycled because infrastructure is under-developed. Moreover, much more needs to be done to educate the public about the need to recycle aluminum SD cans and other beverage containers in the BBS. The ECO has learned that some aluminum SD cans generated in the IC&I sectors are being recycled by service clubs and other collectors, but this is taking place despite the lack of enforcement of O. Regs. 102/94 and 103/94 by MOE and could divert aluminum cans from collection in the residential BBS.

The ECO believes that MOE should set an ambitious recovery rate for aluminum cans based on recovery rates that are achieved by deposit-refund systems in other Canadian jurisdictions. To this end the ECO commends MOE for directing the WDO in early 2004 to increase diversion rates for residential recyclables to 60 per cent by 2008. However, unless MOE sets a strong target for the IC&I sectors and establishes consequences for non-compliance it seems unlikely that aluminum SD can recovery rates will significantly improve in the short-term.

Conclusion

Waste issues are of great importance to Ontario residents. Decisions about beverage packaging waste will have an important impact on the abilities of the province and municipalities to manage waste problems. There is, as well, strong public support for innovative solutions to these problems.

The refillable SDC regulations were enacted by the Ontario government in 1985 to promote the Blue Box system. Industry officials involved in the 1985 consultations stated expressly that eventually the refillable soft drink system would be replaced by the BBS and this has, in fact, happened. This compromise was never accepted by some stakeholders and this dispute has sustained an animated public debate on the regulations since 1985. Moreover, it appears that the shift to recovering recyclable SDCs in the BBS is that the BBS has never met the environmental objectives for recovering, recycling and refilling SDCs that were set out for it in the late 1980s and early 1990s. When the policy decision was made in 1985 to allow the soft drink industry to shift its focus to non-refillables SDCs, industry representatives promised MOE and other stakeholders that SDC recovery rates in the BBS would eventually approach levels that were comparable to those that could be achieved with deposits and refillables. Indeed, MOE's press release announcing creation of the BBS stated that the regulations would require that "all non-refillables must reach a 50 per cent recycling rate within three years" of September 1985. These assurances continued into the 1990s. However, current evidence suggests that aluminum can recovery rates in the BBS remain mired below 50 per cent more than 15 years after they were supposed to reach 50 per cent levels.

Balancing social, economic, scientific and environmental protection concerns is a guiding principle of the *Environmental Bill of Rights*. The *EBR* asks Ontario ministries to integrate economic, environmental, social and scientific considerations when they make decisions that may affect the natural environment. The evidence we have reviewed indicates that refillable PET bottles are a good choice for the environment, and may have economic advantages in certain circumstances. The LCA studies reviewed by the ECO strongly suggest that certain types of refillable containers such as refillable PET have a significantly lower environmental impact than non-refillable containers in certain conditions. Indeed, there may be a role for refillable PET in Ontario's SDC mix in the future. However, it appears that the evolution of Ontario's BBS in the past 20 years would preclude a quick return to refillable SDCs.

The ECO will track this issue and report on progress in future annual reports.

Review of Application R0334:
Classification of Chromium-containing Materials as Hazardous Waste
(Investigation Undertaken by MOE)

Background/Summary of Issues

The applicants requested that Regulation 347 under the *Environmental Protection Act* be reviewed. Under the current regulation, a waste is considered toxic if the total chromium extracted from it during a leachate test exceeds 5 mg/L. The applicants said the legislation should differentiate between toxic and non-toxic forms of chromium. Treating a non-toxic material as hazardous places an unnecessary economic burden on industry.

Ministry Response

In 1996, MOE decided to conduct a review.

In December 1997, MOE told the ECO that proposed changes to a federal Transport Canada regulation will deal with this issue. MOE indicated that in the interests of federal/provincial harmonization work, and to avoid duplication of effort, it was waiting for the federal regulation to be finalized before doing its own review. MOE did not anticipate that the federal work would be complete before early 1998.

In December 1998, MOE indicated that this review would be part of the national harmonization initiative review related to the definition of hazardous waste. The ministry stated that it exercises no control over the timing of this federal initiative. MOE informed the ECO in July 2002 that the applicant is no longer producing the chromium-containing waste stream, and that MOE staff would contact the applicants to determine if they may be withdrawing interest in the review. In May 2003, MOE staff again informed the ECO that this contact was yet to be made.

ECO Comment

The ECO finds the eight-year delay in completing this review unreasonable. The ECO will monitor the progress of the recent initiative by MOE, which may lead to withdrawal of the interest on the part of the applicants and a closing of the file.

Review of Application R2002001:
Review of the Regulatory Framework as it pertains to the release of Landfill Leachate to Waste Water Treatment Plants
(Review Undertaken by MOE)

Background/Summary of Issues

The applicants requested that MOE review the following laws and policies as they pertain to the release of landfill leachate to waste water treatment plants (WWTPs):

- *Ontario Water Resources Act*, including provisions for Cs of A for WWTPs (section 53)
- Municipal Industrial Standards for Abatement under the *Environmental Protection Act*
- MOE's Policy 08-06, Policy to Govern the Sampling and Analysis Requirements for Municipal and Private Sewage Treatment Works.

The applicants also requested that the ministry review the following as they pertain to public consultation on sewage/waste water treatment plant agreements:

- Model Sewer Use by-law
- Bill 107 – *Water and Sewage Services Improvement Act*.

The applicants believe that the current legislative and/or regulatory mechanisms listed above, as they pertain to the regulation of landfill leachate discharges to municipal water treatment plants, are ill-equipped to deal with the issues of water quality and environmental health in an effective, efficient and appropriate manner. The applicants state that WWTPs are not designed to treat leachate. They also state that: pre-treatment and/or prior testing should be done before landfill leachates are discharged to WWTPs; all discharge agreements should be made public; and that overstrength or compliance agreements that allow leachate to exceed sewer use by-laws should not be permitted.

Ministry Response

On August 2, 2002, MOE informed the applicants that it would undertake the requested review. Because it included a number of policy, legislative and regulatory components, the ministry expected to complete the review within 18 months. On January 30, 2004, the ministry notified the applicants of the need to extend the completion date. The ministry now expects the review to be completed by June 30, 2004. The applicants can expect to be notified of the outcome by July 30, 2004.

ECO Comment

The ECO will review the application in the 2004/2005 fiscal year.

Review of Application R2002008:
Prescribing the Ministry of Finance under the *EBR*
(Review Undertaken by MOE)

Background/Summary of Issues

This application requested that the Ministry of the Environment (MOE) review O.Reg. 73/94, the General Regulation under the *EBR*, to determine whether the Ministry of Finance (MOF) should be added as a prescribed ministry under the *EBR*. When the *EBR* was first proclaimed in February 1994, MOF was listed as a prescribed ministry under O.Reg. 73/94. In November 1995, the ministry was removed from the list of prescribed ministries when MOE passed O.Reg. 482/95. Thus, MOF no longer was required to consider its Statement of Environmental Values (SEV) and post notices on the Registry inviting public comments on proposed decisions for environmentally significant Acts and policies before the Minister of Finance made decisions on these matters.

The applicants believe that the removal of the MOF from the *EBR* has had drastic consequences for environmental protection in Ontario because MOF no longer has to consider the environmental consequences of its decisions. The applicants believe this has contributed to wide-scale staff cuts at MOE and at other ministries that work on environmental programs. Moreover, the applicants believe that the removal of MOF from O.Reg. 73/94 has had a negative impact on the financing and support of environmental education and outdoor education by the Ministry of Education.

In late 1999, one of the applicants submitted a similar request that MOE review O.Reg. 73/94 to determine whether the Ministry of Education should be added as a prescribed ministry under the *EBR*. While this request was denied, the ECO wrote an article about the issue of prescribing the Ministry of Education in the ECO's 2000/2001 annual report.

Ministry Response

MOE accepted the review in March 2003. In July 2003, MOE completed its review and notified the applicants of its decision that a revision of O.Reg. 73/94 to re-instate MOF as a prescribed ministry under the *EBR* was not required.

In its reasons, MOE explained that requiring MOF to prepare a SEV would probably not change its decision-making in a significant way. Section 1 of O.Reg. 73/94 establishes general notice requirements for the SEV and the *EBR* does not require any ministry to post proposals for Provincial Budget or Economic Statements, or any policies or Acts that are "predominantly financial or administrative in nature." Thus, MOE contends that the Minister of Finance would be required to consider his or her SEV in relation to a very few, if any, environmentally significant proposals for policies or Acts.

MOE further reasoned that section 2 of O.Reg. 73/94 describes the public notice and comment requirements of environmentally significant proposals for policies and Acts and these do not really apply to MOF. According to MOE, this is because section 2 exempts any proposals that would, "if implemented, form part of or give effect to a budget or economic statement presented to the Assembly." Because the main function of MOF is to recommend taxation, fiscal, economic and regional policies, to implement expenditure management policies, to ensure consistency among these policies and other government programs, to develop the Provincial Budget and manage the Ontario government's finances, and to administer the province's major tax statutes, most of MOF's decisions on new laws and policies are exempt from the *EBR*'s normal public notice and comment provisions as set out in section 15(1).

Furthermore, MOE reasoned that policy matters, outside of taxation, which MOF provides advice and direction on, are largely put forward to the public by other ministries. If those ministries are prescribed under the *EBR*, then they are responsible for ensuring that their SEVs are considered when environmentally significant decisions are made. Further, MOE noted that MOF's decisions concerning fiscal and taxation matters are tabled as Budgets and Economic Statements, and debated by the legislature, providing a level of accountability similar to that achieved by notifying and receiving comments from the public using the Registry.

ECO Comment

The MOE's response to the application was narrowly legalistic and failed to grapple with many of the issues that the applicants raised. In its reasons for denying the requested changes, MOE stated that requiring MOF to prepare a SEV would probably not change its decision-making in a significant way because the *EBR* does not require that Provincial Budget or Economic Statements, or any policies or Acts that are "predominantly financial or administrative in nature" be posted on the Environmental Registry. This interpretation is predicated on an interpretation of Part II of the *EBR* that holds that ministries are only required to consider their SEVs when they make prescribed decisions which are posted on the Registry for public comment. The ECO does not agree with this interpretation of the *EBR*. Section 11 of the *EBR* applies to all environmentally significant decisions taken by a minister, not just those that are posted on the Registry. Thus, we also do not agree with MOE's view that requiring MOF to prepare a SEV would probably not change its decision-making in a significant way.

The *EBR* recognizes that environmental issues and responsibilities often cross ministry boundaries, and decisions made by MOF can have important implications for sustainability. To this end, the ECO released a Special Report to the Legislative Assembly of Ontario on January 7, 1996, entitled "Ontario Regulation 482/95 and the *Environmental Bill of Rights*." This special report expressed concern about MOE's decision in 1995 to remove MOF from the list of prescribed ministries under the *EBR*. The special report argued that even though MOF's responsibilities are mainly financial in nature, and most MOF proposals would be exempt from being posted on the Environmental Registry, many of its decisions have the potential to produce environmentally significant effects. For example, budgetary decisions made at MOF in the late 1990s resulted in an aggregate MOE budget decrease of 40 per cent between 1995 and 1999; MOE responded by implementing program and staff changes and reducing resources and services offered to the people of Ontario to provide a healthful environment. As another example, MOF made important changes to the property assessment methods and formulas which are applied by the Municipal Property Assessment Corporation (MPAC) and these changes are increasing the tax burden on many owners of managed forest property and creating considerable stress in rural areas, as documented in the ECO's 2003/2004 annual report on pages 32-34.

If MOF was prescribed under the *EBR*, the ECO would be able to report on MOF decisions and their consistency with a MOF SEV, and review consultation processes followed by MOF in developing its policies and Acts. This would help to ensure greater accountability and transparency in MOF decision-making. The ECO recommends that MOF be prescribed under the *EBR* to help strengthen public participation in government decision-making and improve accountability and transparency. The ECO also recommends that MOF be prescribed for applications for reviews and that the Ontario government examine whether MOF should be required to post information notices on the Registry for certain environmentally significant budget proposals and decisions. Prescribing MOF for applications for reviews will enable the public to encourage the ministry to develop new laws and policies that would advance environmental goals, including, for example, green taxes and economic incentives to conserve energy and resources.

In sum, the ECO believes that MOF decisions should be subject to the *EBR*. Moreover, the ECO agrees with the applicants; MOF should be prescribed under the *EBR*. We urge the Ontario government to review the feasibility of prescribing MOF at its earliest opportunity.

Review of Application R2002010:
Review of Guidelines for Roadless Wilderness Areas
(Review Denied by MOE)

Background/Summary of Issues

In February 2003, the Wildlands League and Sierra Legal Defence Fund (SLDF) submitted an application for review centring on the planning and management of logging road networks in Ontario's public forests, the need for access controls, and the preservation of roadless wilderness areas. The applicants requested that the Ministry of Natural Resources (MNR) and the Ministry of the Environment (MOE) review all existing policies, acts, regulations, and instruments as well as considering the need to develop new legal mechanisms if necessary.

The Wildlands League and SLDF based the need for such a review on their field investigation and report, *The Road Less Travelled?* The report is based on a case study of the Temagami forest. The applicants state that Temagami was chosen because of its large number of access controls and a 1997 land use plan that created several special management areas with the twin goals of forest resource extraction and the preservation of remote values.

As background information, the applicants state that there were 33,000 km of logging roads dissecting Ontario's publicly owned forests as of 1987, with an average of 1,700 km of new road being built each year. However in the last operating year for which information is available (1999/2000), this figure decreased to 528 km of new road being built. As of 1998, there were only 40 roadless areas larger than 200 km^2 remaining in the half of Ontario that allows forest management. Only four areas over 1,000 km^2 still existed in Ontario's managed forest outside of parks. The Wildlands League and SLDF are concerned that Ontario is rapidly running out of forest that is free from the significant impacts of roads.

Logging roads provide access to the forest for other uses. Although some of these uses like camping and canoeing generally have a modest environmental impact, others like mineral exploration and extraction, as well as motorized hunting and fishing, have the potential to create significant negative impacts on ecosystems. In 2001, MNR estimated that approximately 80 per cent of the logging road network is open to public use in Ontario.

The Wildlands League and SLDF presented an extensive array of scientific evidence that demonstrates the ecological impact of roads. Roads fragment the landscape, creating permanent access that threatens the diversity of forest ecosystems through a variety of direct and indirect human impacts. For example, species whose presence is indicative of ecological integrity, such as caribou, avoid densely roaded areas. Further, roads are often migration routes for invasive plant species that were previously unable to penetrate interior forest habitat. Even populations of fish are not immune to the impacts of logging roads as one study has confirmed that creating motorized access to lakes can cause lake trout populations to plummet abruptly due to increased angling activity.

Twenty-one known access controls exist in the Temagami Forest Management Unit. These controls were established to retain the quality of remote tourism and recreation. A variety of methods were used by MNR to restrict public access including signs, cables, gates and bridge removal, and the creation of physical obstacles like ditches and berms. The applicants' investigation demonstrated a high incidence of access control violations in Temagami, revealing a 55 per cent violation rate. Similarly, according to the Wildlands League and SLDF, a conservative estimate of violation frequency from MNR inspections was 45 per cent in the 14-year period from 1977 to 2000. The applicants believe that this pattern is particularly troubling because the access controls and the Special Management Areas are meant to balance the needs of various forest users and protect ecological dynamics.

The applicants believed that the recommendations from their study are applicable to all of Ontario's public forests, especially those that are currently suffering from poorly planned road-building activities, and poorly planned and enforced access controls. The recommendations also apply to Ontario's few remaining roadless wilderness areas and have particular relevance to the newly established Enhanced Management Areas that were designated to protect remote values.

The Wildlands League and SLDF made the following recommendations involving roadlesss areas, remote area and roads planning, and controlling access:

- MNR should complete its provincial policy on roadless wilderness areas, as legally required by the Class Environmental Assessment for Timber Management on Crown Lands in Ontario (Timber Class EA). This revised policy should focus on the protection of the remaining roadless wilderness areas on the intervening landscapes outside parks and protected areas.

- MNR should articulate clear rules for road planning, construction, decommissioning and access controls in Special Management Areas in Temagami and Enhanced Management Areas and other sensitive areas elsewhere in Ontario in order to protect the remoteness for which these areas were designated.

- MNR should require the development and maintenance of comprehensive access management plans for each forest management unit, which outline specific objectives and strategies for retaining roadless areas and remote access areas. The challenges of successfully controlling access should lead to strategic decisions to limit road construction, road density, and access to remote and sensitive areas.

- To ensure that access controls are fully effective year round, controls must apply to all motorized vehicles including snowmobiles.

- Forest management planners should rely on avoiding sensitive remote areas (for example, remote lakes with healthy and desirable fisheries) rather than relying on enforcement of use restrictions which may be difficult or ineffective.

- Once a decision has been made to protect remoteness and restrict access in an area, the following strategy should be employed in decreasing order of preference: avoid road building in the designated area; choose appropriate road locations; employ only effective access controls at appropriate locations; and, increase enforcement and fines for access violations.

- The approach to effective road planning and management needs to be tailored to the situation at hand. For example, in already accessed lands, more emphasis needs to be placed on decommissioning roads and implementing and enforcing access controls. In areas where access is still in the planning stages, more attention should be placed on creating a workable access strategy that includes carefully selecting access points that will allow for more effective restrictions (e.g., creating only one entrance to a newly accessed area, which can be later decommissioned). This will reduce access control problems in the future.

- MNR should increase its enforcement capacity and capabilities with respect to violations of road restrictions. Higher enforcement rates, fines and other penalties are needed. The public needs to know that such violations are serious and thus be deterred from committing them. This approach to deterrence should be complemented by an educational campaign that helps the public understand why restrictions are needed to protect the forest ecosystem. The ministry should undertake a review of its existing laws and policies related to access and propose any legislative and regulatory changes necessary to ensure better compliance with access controls.

The applicants believed that MNR and MOE should incorporate these recommendations into any ongoing review of forestry guidelines, regulations and policies, including the Timber Class EA review or they should consider initiating an entirely new review. The Wildlands League and SLDF asserted that this review under the *EBR* is necessary as the need for planning and management of logging road networks is not properly addressed by the Timber Class EA Review. They also believed that other related issues, such as access control violations and the need for a roadless wilderness policy, are inadequately addressed.

The Wildlands League and SLDF contend that harm to the environment would result from a failure to undertake this review. The applicants state that it is scientifically well-documented that the building of roads and ineffective access controls can cause the following adverse effects:

changes in the nature of wildlife interactions; waterflow redirection; changes in ground water levels; loss of habitat for plant and animal species, including endangered species; fragmentation of forest habitats; colonization of new areas by invasive plant species; increased predation by predators such as wolves and coyotes that travel through new road corridors to previously inaccessible areas; increases in unregulated hunting and fishing; roadkill; increased harmful emissions within forest ecosystems; increased disturbances from noise, dust, exhaust etc.; increased salinity in ditches and waterways; and, the erosion of soil.

The Wildlands League and SLDF also state Condition 106 of the Timber Class EA required MNR to develop a provincial policy on roadless wilderness areas by May 1997. In response, MNR released Ontario's Approach to Wilderness: A Policy in 1997. The Timber Class EA Review recommended that Condition 106 be deleted as Ontario's Approach to Wilderness has been implemented and represents the provincial policy on roadless wilderness areas. However, the applicants believe that the 1997 policy fails to adequately deal with areas located outside protected lands. The applicants point out that MNR's policy focuses on using parks to meet roadless wilderness objectives, whereas the requirement of Condition 106 was to develop a provincial roadless policy for the entire Area of Undertaking for forestry operations. Therefore, the applicants conclude that there are no rules in place for preserving roadless wilderness areas in the managed public forest.

The applicants state that, although MOE ruled in April 1999 that Ontario's Approach to Wilderness fulfills Condition 106, the Environmental Commissioner of Ontario (ECO) pointed out in its 1999/2000 annual report that this decision contradicts a 1997 letter from MOE indicating their dissatisfaction with the policy fulfilling Condition 106. The ECO also noted that when MOE takes actions outside the *EBR* application process, such as writing the 1997 letter, MOE is in effect reflecting concerns with MNR's implementation of the Timber Class EA. However, the ECO stated then that "it appears that MOE is reluctant to admit that to the public and to the ECO through the *EBR* application process" and that "[c]ircumventing the applications process removes the public's rights under the *EBR*."

Regardless of the differing views on whether MNR is in legal compliance with Condition 106 of the Timber Class EA, the applicants state that it is clear that a proper roadless policy for lands outside of protected areas is needed. The protection of wilderness areas is critical to the protection of Ontario's diverse ecosystems. Protecting wilderness values cannot be accomplished without the designation and protection of roadless areas in both the managed landscape and in protected areas. Unless a roadless policy for areas outside of protected lands is quickly created and enforced, there will soon be little roadless wilderness left to protect according to the applicants.

Ministry Response

MOE denied this application for review. The ministry stated that its assessment of the request was based exclusively on the Timber Class EA of 1994, which is the only regulatory instrument administered by MOE related to forest road access. MOE stated that the issues raised by the applicants were considered during the revisions to the Timber Class EA and, therefore, a review under the *EBR* would be an unnecessary duplication of this process. The ministry also stated that

MNR had fulfilled Condition 106 of the Timber Class EA in developing a "provincial policy on roadless wilderness areas."

The ministry also noted that it had received an application for investigation under the *EBR* in 1999 with respect to MNR's compliance with Condition 106 of the Timber Class EA. MOE stated that their response had been that no investigation would be undertaken as MNR had complied with the requirements of Condition 106 by submitting Ontario's Approach to Wilderness: A Policy within three years of the Timber Class EA approval.

The ministry did not meet the technical requirements of the *EBR* in handling this application. MNR received the application on February 27, 2003 and provided the applicants with a decision seven days late on May 5, 2003. The application for review appears to have been handled by the Director of the Environmental Assessment and Approvals Branch.

ECO Comment

The ECO agrees with MOE's decision to deny this application for review. However, as the review of the Timber Class EA by the Environmental Assessment Board was occurring at the time of this application, the ministry should have told the applicants that their concerns would be considered as part of this process.

The Timber Class EA, including its recent revision, is at the heart of this issue. Condition 106 of the Timber Class EA of 1994 required MNR to develop a provincial policy on roadless wilderness areas within three years. In 1997, MNR released Ontario's Approach to Wilderness: A Policy. However, this policy did not appear to meet the terms of the class environmental assessment. This policy did not address roadless wilderness areas in the Area of Undertaking for commercial forestry as it primarily deals with those already found in protected areas – areas already closed to forestry.

It the position of MOE and MNR that Ontario's Approach to Wilderness policy did meet the requirements of Condition 106. As such, MNR recommended to MOE in its review of the Timber Class EA that this condition be dropped. MNR states that the wilderness park class target had been achieved to the extent possible within the OLL planning area and that "by definition, wilderness parks and wilderness zones in other types of parks are roadless." However, the ECO observes that OLL did not in fact create any new wilderness class parks and, therefore, did not significantly affect the quantity of roadless wilderness areas in the province.

Another way of looking at this issue is that the applicants asked for a review of the 1997 policy. The Ontario's Approach to Wilderness: A Policy is more than five years old, and, given that MNR had committed to MOE to revisit it in 1998, is ripe for review. The ECO agrees with the applicants that MNR should review the 1997 Ontario's Approach to Wilderness Policy with a view to completing its policy for addressing roadless wilderness outside of parks and protected areas.

MOE received over 500 comments during the Timber Class EA review protesting the deletion of condition 106, and requesting a condition requiring MNR to develop a policy to maintain roadless areas outside of parks and protected areas. These comments came from disparate stakeholders such as environmental groups, tourism associations, and foresters, as well as hundreds of form letters.

MNR's new Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario states that road planning shall include the "consideration of reasonable use management strategies which include public access provisions or restrictions, maintenance provisions and, where appropriate, abandonment provisions." Planning must also occur for any "preventive and mitigative" measures for water crossings, "including a recommendation on the future removal of the crossing structure, if the road is planned to be abandoned." Further, the revisions by MNR to the Forest Management Planning Manual in 2003 now identify roadless areas by default as it is a requirement to map all existing roads.

The ECO believes that the recent revisions to the Timber Class EA and the Forest Management Planning Manual do not sufficiently address roadless wilderness areas within the Area of Undertaking. The ECO encourages MNR to consult on and develop a policy that explicitly addresses roadless wilderness areas and forest road access within the Area of Undertaking for forestry operations, including sufficient resources to enforce and monitor the field-based results of such a policy.

Review of Application R2002011:
Aquaculture in Georgian Bay – Water Quality and Environmental Monitoring
(Review Pending by MOE)

Background/Summary of Issues

The applicants requested a review of the existing policies and regulations for open netcage aquaculture in Georgian Bay public waters as a result of concerns regarding:

- Water quality
- Environmental monitoring
- Nutrients from fish waste and uneaten food
- Escapement (escape of caged fish) and its potential genetic impact on native fish
- Enforcement and fines.

In support of their application, two substantial reports were provided by the applicants. Since the applicants raised concerns related to the policies and regulations of three ministries, the submission was handled as three separate applications. The ECO forwarded the applicants' request for a review of the *Nutrient Management Act* due to concerns about nutrients from fish waste to the Ontario Ministry of Agriculture and Food (OMAF). Concerns regarding the policies and regulations for escapement, enforcement and fines were forwarded to the Ministry of Natural Resources (MNR). Lastly, concerns regarding the policies and regulations for water quality and environmental monitoring were forwarded to the Ministry of the Environment (MOE) and are discussed below. Please refer to pages 179-180 and 246-248 of the Supplement for a description of the responses from the other two ministries.

The applicants noted that the eastern shoreline of Georgian Bay is primarily used for recreational activities, as a source of drinking water and as a receiver of domestic sewage. However, a decline in walleye and bass yields, changes in water clarity, the appearance of zebra mussels and periodic high concentrations of *E. coli* have raised questions about the consequences of increasing development activity, fish farming and dredging activity in the area.

The applicants noted that open netcage aquaculture operations discharge fish waste and uneaten food directly into open water, which raises phosphorus levels. They note that phosphorus is a "key limiting nutrient" that, when elevated, can change an ecosystem in dramatic ways "by increasing primary production," i.e., increasing plant growth. Although studies indicate that total phosphorus (TP) for open Georgian Bay water is 3-5 µg/L, MOE uses 10 µg/L as the level at which aquaculture operations are required to take corrective action. The applicants believe that MOE chose this level due to a "lack of more precise analytical procedures" in spite of conducting a study on Georgian Bay in which lower concentrations of TP were measured. In addition, the applicants point out that the Provincial Water Quality Objectives state that if TP is lower than 10 µg/L, it should be maintained at the lower level. The applicants believe that this policy was ignored when MOE developed its "Operational Monitoring of Aquaculture Operations" document in 2001 and that MOE should be using the lower level for TP thereby ensuring that the ecosystem is not changed by elevated phosphorus levels. The applicants ask that MOE "confirm that local water and sediment quality is not being impacted" by doing an "annual assessment of the benthic community."

Furthermore, the applicants believe that designating a 200-metre-diameter mixing zone for determining TP levels around aquaculture sites is unacceptable and advises that it is not allowed for any other user of public waters that discharges wastes that are deleterious to fish, water quality and fish habitat. The applicants have requested that MOE review this policy.

In addition, the applicants note that decomposing fish waste and uneaten food create zones of low oxygen levels that "dramatically shift the species composition in the area." They believe that MOE has set an inappropriate trigger level for dissolved oxygen and would like it changed such that if the background level in the thermocline is below 12 µg/L in mid-summer or mid-winter, aquaculture will not be permitted in that area. In addition, they note that relying on dispersion into public waters to dilute the wastes "shifts the cost to the surrounding environment." The applicants have requested a review of the trigger level for dissolved oxygen at aquaculture operations.

The applicants believe that MOE has, to this point, not taken into consideration the possibility that bacteria from fish, fish food and aquaculture practices may be contaminating the surrounding water. In support of their claim, the applicants provided a list of "bacteria of significance as human pathogens isolated from fish or their immediate environment." The applicants ask that MOE assess the impact of bacterial contamination from fish, fish food and aquaculture practices on adjacent waters.

Ministry Response

MOE has agreed to undertake the review. MOE advised the applicants on May 12, 2003, that it would take 18 months, since the review would include a number of policy, legislative and regulatory components. As part of its review, MOE plans to discuss environmental monitoring conditions found in aquaculture licences with MNR. MOE noted that environmental monitoring requirements are documented in a report entitled "Recommendations for Operational Water Quality Monitoring at Cage Culture Aquaculture Operations, Final Draft April 2001" and that the applicants had contributed to the development of this report.

MOE also indicated in its response that this *EBR* review "supports Ontario's commitment to the 2002 Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem."

ECO Comment

The ECO is pleased that MOE has agreed to do this review and looks forward to reviewing the handling of this application in our 2004/2005 annual report.

Review of Application R2002014: Review of Ontario Regulation 73/94 to prescribe the *Fish and Wildlife Conservation Act* for Applications for Review under the *EBR*

(Review Undertaken by MOE)

Background/Summary of Issues

In March 2003, the Ottawa Valley Chapter of the Canadian Parks and Wilderness Society (CPAWS) and Earthroots jointly filed an application for review of Ontario Regulation 73/94. This regulation specifies which ministries and Acts are subject to the *Environmental Bill of Rights* (*EBR*). The applicants requested that s. 6(2) of Ontario Regulation 73/94 be repealed in order that the *Fish and Wildlife Conservation Act* (*FWCA*) be prescribed for applications for review under Part IV of the *EBR*. This application was sent to both the Ministry of the Environment (MOE) and the Ministry of Natural Resources (MNR).

There are currently 21 Acts prescribed for applications for review under the *EBR*. The *EBR* allows "Any two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister." Section 6(2) of Ontario Regulation 73/94 specifically excluded the *FWCA*, and its associated regulations, from applications for review under *EBR*. The applicants state that there is no justification for its exclusion.

CPAWS and Earthroots contend that prescribing the *FWCA* for the purposes of applications for review is consistent with the general purposes of the *EBR*. The *EBR* states that, "The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations. While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner."

The applicants also state that the *FWCA* is the primary legal mechanism for the conservation of Ontario's fish and wildlife populations. CPAWS and Earthroots assert that it is an environmentally significant statute as the *FWCA* regulates activities such as hunting, trapping, fishing, and wildlife rehabilitation.

The applicants state that the environmental significance of the Act has been recognized by several Ministers of Natural Resources and the Environmental Commissioner of Ontario. Additionally, public comments received on previous MOE proposals to amend the regulation also were supportive of making the *FWCA* subject to Part IV of the *EBR*. Therefore, CPAWS and Earthroots argue that the full public participation provisions of the *EBR* should apply to the *FWCA*.

The applicants also requested ss. 3 and 9 of Ontario Regulation 73/94 be amended to accurately reflect existing legislation. At the time of this application for review, Ontario Regulation 73/94 still listed the *Game and Fish Act* rather than its replacement, the *FWCA*, that came into force in January 1999.

Ministry Response

MOE undertook this application for review. The ministry did not find any evidence to warrant the continued exclusion of the *FWCA* from the requirements of Part IV of the *EBR*. MOE reached the following conclusions in consultation with MNR:

- The *Fish and Wildlife Conservation Act, 1997* and its related regulations can be reasonably expected to have significant environmental impacts related to the protection and conservation of natural resources.

- The *Fish and Wildlife Conservation Act, 1997* and its related regulations would likely benefit from the opportunities for regular review that would be provided by subjecting the Act to the requirements of Part IV of the *Environmental Bill of Rights*.

- Ontario Regulation 73/94 should be amended to include the *Fish and Wildlife Conservation Act, 1997* under Part IV (Applications for Review) provisions of the *Environmental Bill of Rights*.

Prior to the completion of the MOE's review, Ontario Regulation 257/03 was filed in June 2003. This regulation amended Ontario Regulation 73/94 under the *EBR* to explicitly identify the *FWCA* in ss. 3(1) and 9(1). As a result of these amendments, several of the applicants' concerns were addressed prior to MOE rendering a decision on this application for review.

MOE provided adequate detail and clear explanation to the applicants of the outcome of this application for review. The ministry responded to each of the concerns raised by the applicants. MOE conducted the review in a reasonable amount of time given the transition of government during 2003. The review appears to have been conducted by the Manager of MOE's *Environmental Bill of Rights* and Freedom of Information Offices.

This application for review was also forwarded to MNR. MNR returned the application stating that it was not responsible for the administration of the *EBR*. However, MNR stated that it would cooperate fully with MOE in determining whether a review of Ontario Regulation 73/94 was necessary.

ECO Comment

The ECO commends MOE for committing to prescribing the *FWCA* for applications for review under Part IV of the *EBR*. The *FWCA* is an environmentally significant statute and has been prescribed for investigations since 1996 when Part V of the *EBR* began to apply to MNR. The ECO concurs with MOE that the Act and its regulations will benefit from public opportunities for review provided by the *EBR*. In addition to the *FWCA*, the following regulations under the Act will now be eligible for applications for review:

- Ontario Regulation 663/98 (Area Descriptions)
- Ontario Regulation 664/98 (Fishing Licensing)
- Ontario Regulation 665/98 (Hunting)
- Ontario Regulation 670/98 (Open Seasons – Wildlife)
- Ontario Regulation 666/98 (Possession, Buying and Selling Wildlife)
- Ontario Regulation 667/98 (Trapping)
- Ontario Regulation 668/98 (Wildlife in Captivity)
- Ontario Regulation 669/98 (Wildlife Schedules)
- Regulation 530 (Wildlife Management Units).

As demonstrated by this application for review, expanding the number of statutes prescribed under the *EBR* fosters public participation and promotes positive changes toward environmental protection in Ontario.

Review of Application R2003001:
Scrap Tires Used in the Construction of a Farm Fence
(Review Denied by MOE)

Background/Summary of Issues

The applicants requested a review of s.6(3) of Regulation 347, R.R.O. 1990, under the *Environmental Protection Act (EPA)*. This regulation states that a site having 5,000 tire units or more is required by the *EPA* to have a Certificate of Approval (C of A). The applicants would like to use scrap tires to build farm fences and corrals without having to obtain a C of A – more than 5,000 tires are required to fence 160 acres of farmland. They believe that the current C of A requirement deters people from using scrap tires to fence farmland and request that the regulation be changed to allow tire fences and corrals to be built without a C of A.

The applicants recognize that the requirement for a C of A was enacted after the Hagersville tire fire to prevent anyone from storing large numbers of tires thereby creating a fire and an environmental hazard without taking appropriate precautions. Although the applicants do not dispute that large numbers of tires present a fire hazard, they believe that tires used to build farm fences do not present the same hazard. In particular, they note that tremendous heat is required to ignite a tire – a grass fire is not sufficient. They also note that if the tire fence is deliberately set on fire, firefighters would have easy access because of the design of the fence.

The applicants claim that tire fences are environmentally safe and have the following benefits:

- Trees do not need to be cut down to make fence posts

- Fences can be built on land that previously could not be fenced because the land was too rocky
- Scrap tires are not burned or buried releasing pollutants into the environment
- Tire fences repel insects such as flies, mosquitoes and bees that attack farm animals.

The applicants note that tire fences could provide the means to recycle the 10,000,000 scrap tires discarded annually in Ontario and could assist MOE with solving the issue of recycling scrap tires. They also note that the Alberta Environment Department and Transportation and Utilities Department have already given their approvals for this application of used tires in Alberta.

One of the applicants has built a tire fence on his hobby farm in the Town of Fort Erie. He was paid $1000 per trailer load to take the tires from tire recyclers in the area. However, concerns from neighbours, prompted the town to charge him with illegally storing tires. The town subsequently lost three court cases which have ruled that tire fences are not storage. In March 2003, the town amended its fencing by-law to prohibit tire fences. In response, the applicant appealed to the Normal Farm Practices Protection Board (NFPPB) hoping for a ruling that tire fences are a normal farm practice and therefore cannot be prohibited by the municipality. After hearing evidence from the applicant, experts on the West Nile virus, farmers, the fire department and the Niagara Health Department, the NFPPB ruled that tire fences are not a normal farm practice. It concluded that the applicant did not meet the definition of a farmer and that concerns regarding the health, safety and the environment outweighed the use of tire fences in agriculture.

Ministry Response

In May 2003, MOE concluded that a detailed review would not be conducted. MOE explained that the best way to ensure that scrap tire sites are environmentally sound is to require each site to be reviewed and approved under Part V of the *EPA*. MOE noted that municipalities are currently addressing the public health threat posed by the West Nile virus including the potential for infected mosquitoes to breed in water that collects in tires. MOE also explained that it cost the province over ten million dollars to cleanup after the Hagersville tire fire in 1990. MOE concluded that it was not in the public interest to consider whether or not to loosen the restrictions on the disposal of scrap tires at this time.

MOE advised the applicants that they could apply for a C of A if they wished to use more than 5,000 tire units on a parcel of land.

ECO Comment

The ECO believes that the decision by MOE to deny the review was reasonable. At the time MOE reviewed this application, there was growing concern regarding West Nile virus and ongoing concerns regarding tire fires. The potential impact of both of these threats to human and animal health and to the environment is significant. Spurred by the spread of West Nile virus into Ontario, in June 2003, MOE ordered the cleanup of nine sites illegally storing scrap tires and SWAT inspections of other sites. Although the applicants dispute the finding that tires are a breeding ground for mosquitoes, they provided no proof to support their position. In addition, concerns about leachate from scrap tires entering the groundwater have also been raised in Ontario, and in one case, are the subject of private litigation. The ECO does not believe that the requirement to obtain a C of A is particularly onerous or unreasonable since a C of A provides some assurance that good environmental practices are implemented.

MOE advised the applicants of its decision on their application in late May 2003, shortly after MOE posted a notice requesting that industry develop a waste diversion plan for scrap tires. It would have been appropriate for MOE to advise the applicants of the status of the initiative and that opportunities would be available to them to present their ideas during the development of the waste diversion program. Further information regarding the *Waste Diversion Act* can be found in the 2002/2003 annual report on pages 77-80.

Review of Application R2003002: Ontario Forest Industry Compliance System
(Review Denied by MOE)

Background/Summary of Issues
In April 2003, the applicants submitted a request for review of the compliance self-inspection system adopted by the Ministry of Natural Resources (MNR) for the Ontario forest industry beginning in April 1998. The request was based on the Pembina Institute's report "Industry Self-Inspection and Compliance in the Ontario Forest Sector," which was submitted as supporting evidence for the application.

The Pembina report questions the adequacy of the legal and policy framework, industry's self-evaluation capacity, conflict of interest on the part of the forest industry, MNR's oversight capacity, and the loss of oversight capacity by legislative officers and the public. The report also questions MNR's capacity to oversee the self-inspection regime, citing a 67 per cent reduction in MNR forest operations inspectors since 1994/1995, critical internal and external reviews of the self-inspection system, and Pembina's analysis of available forest operations inspection reports.

The applicants requested a review of MNR's regulatory framework relating to the self-inspection regime for the forestry industry. The applicants also requested MNR develop a number of new policies. The applicants really wanted a review of alternatives to the compliance self-inspection regime. The applicants suggested that MNR either re-establish primary responsibility for carrying out compliance inspections, or that the ministry establish a profession of independent forest operations inspectors. In the alternative, the applicants requested a review of the need for a number of new policies, including:

- The establishment of mandatory training and certification requirements for non-MNR employees carrying out inspections of forest management operations
- Modification of the ministry's reporting practices to clearly distinguish the data on instances of non-compliance identified through primary inspections by MNR staff from data on situations where MNR staff are following up on reports of non-compliance by licence holders
- More timely public reporting of forest management activities through annual reports on timber management and other documents.

The applicants also requested that MNR's instrument classification regulation under the *Environmental Bill of Rights* (*EBR*) be reviewed to make more forestry instruments subject to Part II of the *EBR* – the Environmental Registry notice and comment provisions.

The ECO forwarded the application to MNR, but also sent it to MOE because of the request for review of Ontario Regulation 261/01, MNR's instrument classification regulation under the *EBR*.

Ministry Response
MOE responded that it would be inappropriate for MOE to consider the application since section 21(1) of the *EBR* states:

> A minister shall from time to time review the regulations that classify proposals for instruments as Class I, II or III proposals and that relate to Acts administered by the minister for the ministry and shall prepare proposals to amend the regulations as the minister considers advisable.

MOE said that as the minister in question here is the Minister of Natural Resources, the ministry responsible for the *CFSA*, the MOE would have no jurisdiction with respect to classifying these instruments.

As such, MOE returned the application to the ECO and had no further obligations in relation to the application.

ECO Comment
The ECO provided consent under s. 64(1) of the *EBR* for MOE to return the application. MNR denied the application for review.

While MOE did not respond directly to this application, the ministry did respond to the issues raised by the applicants in another forum. MOE is responsible for the approval of MNR's forest management activities under the *Environmental Assessment Act* and terms and conditions in its Timber Class Environmental Assessment (EA). Specific terms and conditions are set out by MOE to govern forest operations inspections, independent audits, monitoring and reporting. (For further information, see our review of the Timber Class EA renewal in the annual report on pages 94-99 and in the Supplement on pages 95-104).

The applicants included discussion of MNR's proposed terms and conditions for the renewal of the 1994 Timber Class EA and the MOE's 2003 Proposed Declaration Order Renewing the Class EA in their application, and made one recommendation related to the EA in the recommendations of their report, with an appendix to the report devoted to the issue. The applicants stopped short of specifically requesting *EBR* review of the matters related to the *Environmental Assessment Act* however, probably because it would have been denied on the basis that the renewal of the Class EA was underway at the same time.

The applicants also participated in the public consultations on the Timber Class EA renewal, sending MOE a copy of the "Industry Self-Inspection and Compliance in the Ontario Forest Sector" report along with detailed comments on the proposed terms and conditions in the Declaration Order. While MOE did not resolve all of the applicants' concerns through the EA process, MOE did address several of the specific matters the applicants requested in this MNR review, by adding the following requirements to the term and condition on forest operations inspections:

- MNR shall ensure that statutes and regulations relevant to forest management activities are interpreted consistently, supervised adequately, and enforced fairly but firmly in all cases of non-compliance.
- Individual inspection reports from forest operations inspections shall be available for viewing at the local level by the Local Citizens Committee and the general public, for the most recent five years.
- By June 2004 MNR shall make available to the public, via its internet site, forest management unit annual reports of forest operations inspections
- The requirement to prepare annual reports of forest operations inspections must be incorporated into the Forest Management Planning Manual
- These reports shall distinguish between forest industry inspections and MNR inspections, and shall identify MNR inspections of incidents of non-compliance reported by the forest industry.
- Reports shall accumulate for five years, and thereafter, the most current five years of reports shall be maintained.
- MNR shall develop a program for mandatory training and certification of forest operations inspectors by June 2004.

Although the application was returned by MOE, the ministry did address some of the applicants' concerns about the forest operations inspections program under the Environmental Assessment process. In fact, as noted above, MOE put in place several very significant, stringent regulatory requirements that MNR through the Environmental Assessment process. These issues are discussed further in our review of MNR's handling of the application on pages 129-131 of the annual report and pages 250-260 of the Supplement.

Review of Application R2003004:
Review of Amendments to Ontario Regulation 73/94 under the *EBR* to prescribe the Ministry of Transportation for Applications for Review
(Review Undertaken by MOE)

Background/Summary of Issues
In July 2003, the ECO received an application for review of Ontario Regulation 73/94 under the *Environmental Bill of Rights* (*EBR*). This regulation precludes the public from requesting a review of the Ministry of Transportation's (MTO's) policies and prescribed Acts, regulations, and instruments (permits, licences etc.). Neither can the public ask the Minister of Transportation to review the need for new Acts, regulations and policies. The applicants believe that MTO should be subject to review due to the environmental impacts of highway development and use, and the need for MTO to consider and/or promote other transportation alternatives, such as rail.

Ministry Response
In September 2003, the Ministry of the Environment (responsible for O.Reg. 73/94) notified the applicants and the ECO that the ministry would undertake the review within a six-month timeframe. In February 2004, the Ministry of the Environment provided notification that it

required an additional 60 days. As of April 2004, the ministry indicated that the review's expected completion date is September 30, 2004. Therefore, the applicants and the ECO should receive notice of the review's outcome in October 2004.

ECO Comment
Based on the timeframe provided by the Ministry of the Environment, the ECO will review the handling of this application in the 2004/2005 reporting period.

Review of Application R2003006:
Review of the Drive Clean Program for Light-duty Vehicles
(Review Denied by MOE)

Background/Summary of Issues
In October 2003, the applicants requested a review of the Ministry of the Environment's (MOE) mandatory vehicle emissions inspection and maintenance (I/M) program or "Drive Clean," especially as it applies to light-duty vehicles (cars, vans, trucks and sport utility vehicles weighing less than 4,500 kg). One of the applicants had previously requested a review of the program in November 2000. The 2000 application raised a list of detailed concerns about the effectiveness of the Drive Clean Program, such as: the program's reliance on a controversial computer model, the alleged biased nature of the program evaluations, the inadequate transparency of the program, and the unwillingness of the ministry to share raw data, evaluation methodology or program assumptions. MOE denied the request for review and the ECO reviewed the ministry's handling of it in our 2001/2002 annual report.

In their current application, the applicants raised two main concerns about Drive Clean. First, they presented what they described as additional new evidence: an independent study of Drive Clean performed in 2002-2003 "revealing the arbitrary nature of Drive Clean test results." The cited study involved 26 vehicles between 10 and 17 years of age, with a minimum of 130,000 km accumulated mileage. The vehicles were recruited through television and radio advertisements. Each vehicle was given a Drive Clean test. Immediately prior to the test (which includes a built-in warm-up regime), each vehicle was subjected to the same brisk, 3.2 km preconditioning drive, followed by an additional 2-minute, 40 km/h warm-up drive on the test dynamometer. The study found that only one of the 26 vehicles (or 4 per cent) failed the Drive Clean test. The observed failure rate was much lower than that which was expected; the study points out that Drive Clean's historical failure rate for vehicles aged 10-17 years is 30 per cent.

According to the applicants, the new study "adds to the already strong evidence that older vehicles are being falsely failed in the Drive Clean program." False failures are occurring because vehicles are not properly prepared or preconditioned for the Drive Clean test. The applicants state that the section of the Drive Clean Standard Operating Procedures (SOP) manual which describes the test procedures does not include an adequate discussion on proper preconditioning. A detailed discussion which addresses *how* to properly precondition vehicles occurs only in the diagnostic section, found in the appendix of the manual, which is used after vehicles have failed and require expensive repairs and retesting. The applicants believe that an emphasis on proper preconditioning is needed in the test procedures section.

The applicants emphasized the unfairness of false failures: "it is manifestly unfair to virtually confiscate older vehicles, whose owners tend to be of more limited financial means, not because the vehicles themselves are relatively high emitters, but because they had not been properly prepared (preconditioned) for the Drive Clean test." The applicants also asserted that the new measures to "improve" Drive Clean through tightened emission limits "will result in more "repairs" being performed, but often on the wrong vehicles." Therefore, according to the applicants, Drive Clean's testing protocol must be improved. Reliable testing can only be achieved through "a proper and consistent preconditioning protocol and setting limits that relate to vehicle emissions only after their ECS [emission control system] has been fully stabilized through proper conditioning."

The second main point made by the applicants pertains to the acknowledgement by the U.S. Environmental Protection Agency (EPA) that MOBILE 5 – the computer model used in the U.S. to predict emissions reductions from I/M programs – overestimates the deterioration rate of light-duty vehicles. In its place, the U.S. EPA has recently developed MOBILE 6. According to the applicants, "the predicted deterioration rate in the new MOBILE 6 model is much, much lower than in the previous, highly flawed, MOBILE 5 model." Drive Clean's MOBILE 5C model is based on MOBILE 5. The applicants asserted that "the acknowledgement of the lower deterioration rate by the U.S. EPA has undercut virtually any theoretical justification of Drive Clean" and makes Drive Clean's "estimated claims of emission reductions – which were based on MOBILE 5 – nonsense."

Ministry Response

In December 2003, the Director of MOE's Drive Clean Office denied the request for review. The ministry's decision summary declared that the resources required did not justify a review at that time as "a preliminary review of the Application did not reveal any new evidence." The decision summary also pointed out that the program is subject to periodic review and that the public was given ample opportunity to comment on the program through the Environmental Registry throughout its design and implementation stages.

The ministry devoted a large portion of its response to a discussion of the applicants' first main concern: the inadequacy of Drive Clean preconditioning protocols and the consequences of this. On this subject, MOE asserted that the conclusion drawn by the applicants from the cited study – that many Drive Clean tests result in false failures due to improper preconditioning – is not valid. MOE stated that there is no basis for the applicants' conclusion as the study's methodology was not sound. The study failed to establish that the 26 vehicles selected constituted a representative sample; "no tests were done prior to the "preconditioning" to determine if any of the vehicles would have failed without any special treatment, and to establish that the special treatment actually may have altered the vehicle's test results. No tests were done on a control population of vehicles to verify the expected failure rate for the sample without the special treatment."

Using its database of Drive Clean test scores, MOE was able to identify recent official test scores for the exact same 26 vehicles that had been used in the study cited by the applicants. MOE found that "only 4 had failed a Drive Clean test recently." While this was more than the study results of one failure, it was also less than eight (the number of failures that would have been expected based on a 30 per cent failure rate). The ministry also noted that no clear pattern of emissions reduction emerges when the recent official Drive Clean test results are compared to the applicants' study data for each of the 26 vehicles. In a comparison of the recent official test scores for the 26 vehicles to the test scores for the same 26 vehicles from the cited study (which involved additional preconditioning), the ministry found that:

- 5 vehicles had noticeably lower emissions after "preconditioning"
- 3 had noticeably higher emissions
- 18 appeared to have similar emissions.

However, MOE acknowledged: "These "changes" in results cannot be attributed to the "preconditioning" as weeks to months had passed between the tests. It is equally possible that the vehicles would have had similar changes in their results without 'preconditioning'".

Further, MOE commented on the adequacy of Drive Clean warm-up protocols. It pointed out that the warm-up period employed in Drive Clean is "longer than many similar programs elsewhere in North America." Drive Clean tests involve a 30-second warm-up period in the summer and a 90-second warm-up period in the winter. Warm-up, which is conducted under load "is rapid since the dynamometer rollers simulate climbing a slight incline." In its cover letter, the ministry also stated: "The Drive Clean Office has taken steps to improve the Standard Operating Procedure to ensure that warm-up requirements are clearly described for application by vehicle emission inspectors and by the owners of the Drive Clean Facilities."

MOE also made two observations about the role of preconditioning and the reproducibility of Drive Clean test scores. First, it acknowledged that "vehicles with marginal emission failures may marginally pass if there is an extended warm-up period." However, it argued that even "vehicles with marginal passes have an emissions-related problem that requires repair" and that "vehicles with properly maintained emission control systems typically have tailpipe emissions which are 75 to 90 per cent below the emission [test] standards." Second, while it stated that Drive Clean test results are generally reproducible, it did suggest that some vehicles pose an exception to this rule. In one part of its response MOE stated "Data from tests repeated within a period of a few hours or days indicate that vehicles that pass the first time continue to pass, and vehicles that fail continue to fail if the emissions control systems are not operating properly." Later in the response, it discussed test scores from vehicles with intermittent emission control system faults. According to the ministry, vehicles with intermittent emission control system faults "may pass or fail the test by a wide margin. Once these vehicles are fully repaired, tailpipe emissions typically drop by 75 to 90 per cent, and they remain low, until another emissions problem arises."

The ministry also addressed the applicants' related concerns. On the issue of fairness, MOE reiterated that "vehicles that fail require repairs. The fact that some of these vehicles are marginal failures and may pass the emissions test sporadically does not remove the responsibility of the owner to have them repaired so that unnecessary emissions are reduced." MOE also refuted the applicants' claim that "it is manifestly unfair to confiscate older vehicles," stating that owners of light-duty vehicles can qualify for a repair cost limit of $450 ($200 in new program areas) and a conditional pass which is valid for two years. Owners who choose to replace their vehicles may purchase and use an older or newer vehicle, as long as it passes the Drive Clean test. The response explained that there is a complaint handling process in place to resolve disputes about tests and repairs.

gMOE also commented on the applicants' second main concern regarding the implications of the new MOBILE 6 model. The ministry stated that it welcomes the U.S. EPA's new MOBILE 6 model and that it is assisting Environment Canada in the development of the Canadian version of the new model, expected to be available in early 2004. MOE acknowledged that "MOBILE 6 indicates that the emission control systems on newer vehicles should not deteriorate as quickly as previously thought, so that vehicle emissions will stay 'clean' longer." It indicated that the prediction by MOBILE 6 that newer vehicles should have more reliable pollution control systems is a useful observation and noted that it has, in fact, "observed a small decrease in the failure rate across the whole vehicle fleet since the start of the program." However, MOE also highlighted the important role that Drive Clean plays by requiring repairs to vehicles that fail by a very wide margin. "Since gross emitting vehicles can produce more than 20 times the pollution of properly tuned vehicles, the benefit of finding and repairing these vehicles is obvious. Such improved emission reductions are routinely observed for vehicles of all ages in the program, whether from the 1980s, 1990s, or 2000s."

MOE rebutted the applicants' claim that Drive Clean requires additional trips which harm the environment. It noted that Drive Clean testing is conducted only once every two years (and at transfer of ownership) and that vehicle owners may combine other errands with emission testing in a trip. It also stated that facilities are conveniently located throughout the program area.

In closing, the ministry provided a list of past, present and future Drive Clean reviews and audits. The list referenced, among others, reviews of program operations by an independent auditor; a 2001 program review focused on the light-duty vehicles; and annual reports on emissions reductions by an independent consultant since the program began (the latest approved report is for 1999-2001, the 1999-2002 report is being prepared). The ministry informed the applicants that it intends to undertake a comprehensive review in 2006/2007 which will look at program design and operations and that the "issues raised in the Application will be considered as part of the review at that time."

MOE also outlined the public measures it will take or has recently taken to improve access to Drive Clean information and program results. It indicated it would make available immediately a sample of, and the complete database of, raw Drive Clean test data. It expressed its intention to make available the 1999-2003 report on emissions reductions, once approved for release and to incorporate MOBILE 6C vehicle emission fleet emission estimates in the report. The ministry also committed to monitoring whether vehicle emission control systems in newer vehicles are deteriorating more slowly. MOE provided contact information and indicated that the applicants should contact the ministry should they have further questions.

ECO Comment

The ECO's comments focus on three main issues raised by this Drive Clean application: the quantity and quality of information publicly available about the program; the issue of preconditioning; and the observation that newer emission control systems (ECSs) are more reliable and the implications of this for the program.

The ECO is pleased that MOE engaged in a discussion of the evidence provided by the applicants and their related concerns about Drive Clean. The six-page decision summary constitutes a significant improvement over the ministry's response to the applicants about three years ago, when the first request for review of Drive Clean was denied. It allows for greater insight into some of the observations and assumptions made in the operation of Drive Clean.

MOE's announcement that it will make public the Drive Clean raw test data and its most recent technical assessment of emissions reductions is also a positive one. This information should help improve the transparency and public understanding of the value of Drive Clean. The ECO hopes that the technical report will be made easily accessible through the ministry's Publications Web site, alongside other technical studies and reports, and that its release will be announced through the posting of an information notice on the Environmental Registry. As well, MOE should consider making past versions of its technical reports available on its Publications site.

MOE should also compile and publish any studies done for the ministry on the phenomenon of vehicles that fail the Drive Clean test intermittently. It would be in the public interest to learn how wide-spread this phenomenon is, and the extent to which those vehicles that fail intermittently do so because they have intermittent faults in emission control systems versus the extent to which they do so because they have received inadequate and inconsistent preconditioning.

MOE raised some valid criticisms of the study cited by the applicants. MOE argued that the applicants have provided no evidence that the 26 vehicles are representative of the Ontario population of older vehicles. MOE argued that the study did not include tests done prior to preconditioning, nor did it include tests on a control population of vehicles. Moreover, it is not clear that the sampling methods were random. MOE noted that "The use of an unrepresentative group of vehicles defies the most basic statistical rules." However, MOE did not provide and has not made public any scientific studies to either refute the claims made in the application or to validate its own claims of emission reductions. In addition, review applicants should not be required to *prove* their concerns merit a review. The ECO believes that the onus is on the ministry to study a matter and then provide the ECO applicants with a reasoned response, based on the evidence, as to why a review should not be done. In this case, the applicants provided *prima facie* evidence of a problem but MOE declined to undertake a full review.

The ministry could have provided a more convincing argument as to the adequacy of the existing preconditioning protocols for the vast majority of vehicles. The ministry did point out that Drive Clean's warm-up time is longer than many similar programs elsewhere in North America. It also noted that "the ministry has taken steps to improve the Standard Operating Procedure to ensure that warm-up requirements are clearly described." However, MOE could have made a stronger case for the adequacy of the existing preconditioning protocol by answering some of the following questions in its response to the applicants: How does MOE know that it has adequately adapted its protocols, which are based on U.S. EPA protocols, to account for differences in the stabilization of ECSs resulting from differences in climate in Ontario and the U.S? Have any tests been done to verify that warm-up times of 30-seconds loaded in the summer and 90-seconds loaded in the winter are adequate to stabilize the emission control systems of vehicles in Ontario for vehicles of all ages tested by the program? Are Drive Clean technicians required to verify whether or not ECSs have stabilized prior to conducting the test? Does MOE train technicians to determine whether vehicles are properly preconditioned? Does MOE audit this process? The ministry also could have commented on why longer warm-up times are discretionary.

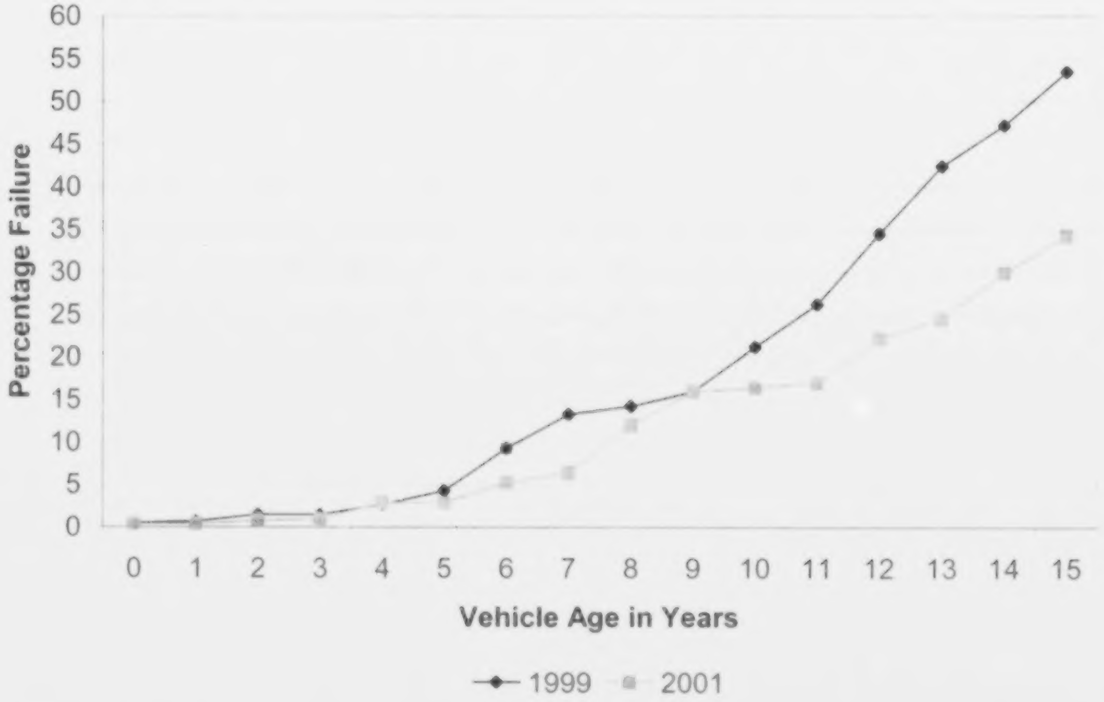
In conversations with MOE in February 2004, the ECO asked the ministry to elaborate on the questions above. MOE explained that the importance of proper preconditioning is stressed to technicians and owners during their training. The ministry also explained that it has a contractor who audits several facilities a day and each facility at least once a year, focusing on quality assurance/quality control matters. In these audits, which may be overt or covert, the auditor checks that steps are taken to determine that a vehicle is preconditioned, among others. However, it is not always possible for the auditor to verify all of the aspects on his or her official checklist during covert audits. In the conversation, MOE indicated that when problems with a facility are identified, the facility operator is called in for a performance interview. Drive Clean licences may be suspended or even withdrawn where a problem is longstanding or serious. While MOE has data on the number of performance interviews, suspensions and withdrawals of licences, it could not comment on the extent to which inadequate preconditioning was a factor in these events.

MOE underscores the importance of preconditioning in its most recent, February 2002, version of the Drive Clean Standard Operating Procedures (SOP). In its guidance in Section 2 on how to prepare a vehicle for testing or retesting on a dynamometer, MOE highlights that "[i]t is important that the vehicle be at normal operating temperature before being tested. Testing a "cold" vehicle may result in a false failure." However, the section does not clarify what constitutes "normal operating temperature" or provide information on *how* to determine whether or not a vehicle is properly preconditioned. There is a fairly lengthy discussion of the causes of improper preconditioning in Appendix B: Diagnostic Procedures for DCF Repair Technicians. The appendix clarifies that a properly preconditioned vehicle has both a warm engine and a stabilized ECS. It explains that, on prolonged idling, or if the engine is turned off for some time, the temperature of the catalytic converter may fall below the point of efficient operation. MOE has informed the ECO that it has plans to further revise its SOP. MOE might consider amending Section 2 to make information on how to ensure that vehicles are properly warmed-up easily accessible to technicians conducting tests (initial and retests) – not just technicians conducting repairs.

In its response, the ministry also addressed the applicants' second main point, acknowledging that ECSs in newer vehicles are more reliable than originally thought. The ECO is pleased that MOE is monitoring this trend in Ontario's vehicle fleet and that it has already made available – to the ECO and to members of the public that specifically request them – its 1999-2000 and 1999-2001 technical summaries of emission reductions. Among other things, these reports calculate and discuss the overall annual failure rates for Ontario's fleet and include tables which reveal annual vehicle failure rates by model year.

The Drive Clean data do indicate that newer model vehicles may have more reliable emission control systems (see graph below). These trends are in line with the observation by U.S. EPA that significant advances were made in the durability of emission control technology of vehicles in the late 1980s. It will be interesting to continue to observe these trends, particularly, whether ECSs continue to be durable. MOE's emissions reductions reports will allow the public to monitor these trends directly. Any presentation of information from 2003 onward will need to make clear and account for the fact that Drive Clean standards for light-duty vehicles were ratcheted down by 11.5 per cent on January 1, 2003 and that they will be further reduced by 11.5 per cent on January 1, 2005.

**Drive Clean Program
Failure Rate by Age of Vehicle
(light-duty component)**



MOE did not agree with the applicants' interpretation of the trend – that "the acknowledgement of the lower deterioration rate by the EPA has undercut virtually any theoretical justification of Drive Clean." It noted: "Since gross emitting vehicles can produce more than 20 times the pollution of properly tuned vehicles, the benefit of finding and repairing these vehicles is obvious." MOE's point is a valid one. It does, however, raise the question of the *likelihood* that a vehicle will become gross-polluter: Are newer vehicles any less likely to become gross polluters as they age compared to vehicles of 1989 and earlier models? If so, how much less likely? In addition to monitoring and making available information on failure rates, it will also be useful for MOE to monitor these trends. In a recent report, the U.S. National Research Council recommended that I/M program managers adopt and monitor this performance measure. This information will help reveal the extent to which Drive Clean is taking gross polluters versus marginal failures off the road and how this changes over time.

Not only is it important that MOE monitor and make publicly accessible these kinds of trends in emissions from Ontario's vehicle fleet, it is important that the ministry use this information in reviewing and making decisions about Drive Clean. As noted, the ministry has committed to undertaking a review of Drive Clean in 2006/2007. The ministry has informed the ECO that the review will inform decisions of whether the program will continue and if so, how it will continue after 2008, when the current contracts with Drive Clean facilities expire. In March 2004, the media reported that MOE planned to phase out Drive Clean by 2008. The Premier subsequently denied that a decision to phase out the program had been made.

MOE should consider conducting and compiling relevant background research well in advance of the planned review, to ensure that results can be considered by stakeholders and the public before decisions are made on future program directions. In the upcoming review MOE should reflect on the emerging trends and consider a number of questions such as: Do new emission control technologies significantly undermine the premise on which the program is based? Is Drive Clean still getting a reasonable return from the program? Should vehicles be tested less frequently? Should vehicles up to five years of age or older be exempt from the program? In reviewing Drive Clean, it will be important to keep in mind that I/M programs were developed in the U.S in the 1970s, at a time when emissions limits permitted for new vehicles were much higher and ECSs were much less reliable.

Other related issues will not be discussed further here, but are relevant to the larger issue, and the ECO will continue to consider them as it monitors the progress of Drive Clean in future years. These issues include: the evaluation of I/M programs; the failure of Drive Clean and I/M programs to directly address particulate matter emissions, a key component of smog; and alternatives to I/M programs, their relative effectiveness and relative costs. The ECO will also consider the appropriateness and sensitivity of the testing procedure used in Ontario's program.

Review of Application R2003007:
Request for Review of Regulation 903 (Wells)
(Review Denied by MOE)

Background/Summary of Issues
In late summer and early autumn 2003, a number of media articles appeared discussing the difficulties that well drillers were having with the revisions to Regulation 903. On October 30, 2003, the ECO received an application requesting a review of the revised Wells Regulation. In early November 2003, the Canadian Environmental Law Association (where the applicants are employed) issued a media release stating their concerns about deficiency they saw in the regulation and its implementation.

The importance and urgency of ensuring the safety of water supplies in Ontario has been greatly heightened since the contaminated water incident at Walkerton, Ontario and the subsequent Walkerton Inquiry led by Justice Dennis O'Connor. One of the recommendations of Justice O'Connor's report was that MOE should review and update the Wells Regulation under the *Ontario Water Resources Act (OWRA)*. MOE conducted this review and posted an *EBR* regulation proposal in April 2002, culminating in a decision in April 2003. (For more information on this process, see pages 110-113 in the annual report and pages 81-86 in this Supplement).

The Wells Regulation (Regulation 903, R.R.O. 1990) under the *OWRA* governs well construction, maintenance, reporting and abandoning wells by setting minimum standards for all types of water wells – private, communal, municipal, industrial and commercial wells. Regulation 903 also sets licensing requirements for Well Contractors and Technicians – persons and businesses involved in well drilling, well boring, well digging and well pump installation. In April 2003, MOE amended the Wells Regulation by way of Ontario Regulation 128/03 which made changes to sections dealing with well construction, technician licensing, retesting, disinfection, annular space, sealants and other sections. In addition, O.Reg. 128/03 also introduced new sections into the Wells Regulation to require the use of well identification tags, to deal with shallow works and for the continuing education of drillers. According to MOE, these amendments creating the revised wells regulation are part of a provincial groundwater strategy, announced in the interval after the contaminated water incident at Walkerton, Ontario and recommended by the Walkerton Inquiry report.

(Note: Section 68 of the EBR (effectively the presumption against reviewing recent decisions) provided MOE with a ready reason for denying this review. MOE did not rely on this provision, instead the ministry chose to respond to the applicants' concerns on a technical basis. This may have been in part because the applicants included reasons why they felt this provision should not be relied upon to deny the application, see vi-ix, below).

The applicants raised the following issues with the O.Reg. 128/03 amendments passed in April 2003 (and described them in greater detail than appears here):

(i) *Background* – the applicants felt that the amendments contained in O.Reg. 128/03 were not adequate to protect the environment or public health and safety. Further, they alleged that the amendments may be legally difficult to interpret and apply.

(ii) *Importance of Well Safety* – poorly constructed wells, and improperly abandoned wells can contaminate groundwater. The applicants alleged that, as amended, Regulation 903 does not adequately guard against this risk.

(iii) *Deficiencies in Regulation 903* – the applicants alleged that the following deficiencies are found in the amended regulation:

  a. *Rollback of Disinfection Requirements* – that lowering the concentration of chlorine required for disinfection of a new well, from 250 mg/l over 12 hours to approximately 50 mg/l over 12 hours, as brought about by the amendments of O.Reg. 128/03, is a serious deficiency. The regulation proposal posted on the Environmental Registry did not include this amendment. The applicants also alleged that the amended Regulation 903 fails to specify how chlorine concentrations are to be measured.

  b. *Removing Excess Chlorine from New Wells* – leaving chlorine in a well for an extended period of time is a health risk, the applicants alleged, because of chlorine gas discharge. The applicants also alleged that heavily chlorinated water may remain in the well or migrate to other groundwater users.

c. *Cleaning New Wells* – the applicants expressed concern that well drillers have no requirement to clean a well such that turbidity and sediment have been thoroughly removed.

d. *Introducing Sediment into Bedrock Wells* – adding clean washed gravel or sand to the water-producing zone of bedrock wells is a requirement of the amended Regulation 903. The applicants expressed concern that this will impair groundwater flow and introduce sediment into new wells.

e. *Sealing Water Line Connections* – Regulation 903, as amended, imposes no requirement to make above-ground water line connections watertight; the applicants contended that this is a significant oversight.

f. *Testing for Explosive/Dangerous Gases* – The applicants expressed concern that the obligation to report the occurrence of gases like methane or radon under Regulation 903 is only a minimum safety requirement. Testing should be required and reporting terms should be clarified, e.g., "natural gas" could be misinterpreted.

g. *Construction Standards for Test Holes* – the applicants identified, and raised concerns about 15 exemptions from provisions of Regulation 903 for test holes, for example, exemptions from yield testing and reporting test holes. One exemption in Regulation 903 is for the reporting of test holes that are abandoned within 30 days of their construction.

h. *Using Used Materials for New Wells* – the applicants cited concerns about the use of used materials in well construction – materials which they felt could be contaminated and thus compromise the well's water quality.

i. *Elimination of Pumping Tests* – a pumping test provides useful information about the well, its yield and the aquifer in which the well is situated. The applicants contended that the amended pumping test provisions are too open-ended, allowing incomplete tests and potentially resulting in poorly documented wells.

j. *Exclusion of Certain Well Caps and Well Screens* – the applicants stated that, as amended, Regulation 903 would prohibit the use of a type of vermin-proof well cap. Similarly, the applicants contended that the amended Regulation 903 excludes the use of stainless steel well screens, because they will not meet the requirement of being water-tight.

k. *Sealant Requirements* – the applicants found that there were interpretive difficulties in the amended subsections of Regulation 903 dealing with sealants, i.e., that it is unclear why the minimum thickness of the sealant is specified for the upper six metres of the well, but not for any depth below six metres. Also, terms like "water producing zone" and "intake zone" should be defined for the sake of clarity.

(iv) *Compliance and Enforcement Concerns* – the applicants expressed concern that in the past MOE had a five-person, full-time team of well inspectors, a chief well inspection official and that these persons responded to public complaints and made unscheduled inspections of new well construction. It was alleged that MOE now relies on "self-regulation" by contractors. This approach is weakened by the lack of technical and training packages, according to the applicants "…to date, the Ontario government has not finalized nor distributed any information to the well construction industry about Regulation 903 or how to meet the new technical standards." and "…it is imperative that Regulation 903 includes clear, concise, effective and enforceable standards."

(v) *MOE Statement of Environment Values* – the applicants cited aspects of MOE's SEV including "exercising caution in favour of the environment" to assert that MOE will be unable under the revised regulation to fully prevent or mitigate potential harm to the environment and public health caused by improper well construction, maintenance or decommissioning.

(vi) *Absence of Periodic Review* – the absence of a formal, open, consultative process to periodically review the adequacy and effectiveness of Regulation 903 was cited by the applicants as the basis for calling for a review under the *EBR*.

(vii) *Resources Required for the Requested Review* – that the requested review would not require new staff or resources was also cited a factor in favour of carrying out the review.

(viii) *Other Relevant Considerations* – since the Ontario government accepted all of the recommendations from the Walkerton Inquiry and since one of the recommendations was a comprehensive source to tap drinking water policy, but because this recommendation has not been implemented, it is necessary to review and revise Regulation 903, according to the applicants. The Walkerton Inquiry also made recommendations about enforcement of drinking water standards and since Regulation 903 is difficult to enforce, according to the applicants, a review is warranted.

(ix) *Presumption Against Reviewing Recent Decisions* – the *EBR*'s presumption against reviewing a regulatory decision made within five years was challenged by the applicants. The applicants noted that the proposal to amend Regulation 903 was posted on the Registry, but that decision-making did not occur in a manner consistent with Part II of the *EBR*. The changes to water and well disinfection requirements was cited as a decision for which there was no public notice or comment opportunity. The applicants also submitted that there was new evidence that the decision to approve the revised Wells Regulation could result in significant harm to the environment and therefore a review was warranted as the *EBR* permits.

Ministry Response
The ministry denied this request for a review of the revised Wells Regulation for a number of reasons. MOE provided a detailed response to the applicants' concerns, most of which is provided below:

Concern for Disinfection Requirements
MOE stated that new research into the effectiveness of different doses of chlorine to disinfect wells indicates that optimal disinfection is approximately 50 mg/L of available chlorine which is counter to intuition that more is better. Lowering the chlorine concentration [from 250 mg/L to 50 mg/L] used to disinfect water wells will raise its effectiveness at killing pathogenic micro-organisms in new wells. Higher chlorine dosages change the general chemistry of the water and reduce the effectiveness of the chlorine. It is required that the specified chlorine concentration be maintained over the 12-hour contact time. The well must be pumped until no chorine odour remains according to the regulation. It would be a prudent measure for the well owner to take a water sample and have it analyzed to confirm the potability of water prior to consuming it. The word "approximately" was retained in the regulation, because groundwater flows through the well during the disinfection time and maintaining an exact dose is not feasible. It is intended that the chlorine concentration is to be measured as residual chlorine. The wording remains the same as the old regulation; only the number has changed.

Contractors should know how to calculate the concentration of chlorine in well water; the regulation does not need to specify how to do this. Also, this information is widely available, for example, OMAF's Best Management Practices handbook on Water Wells covers this topic. The Ministry of the Environment and the Ministry of Health and Long-Term Care both recommend through various publications (fact sheets, Well Aware video, etc.) that the well owner sample their well water periodically throughout the year since water quality can change throughout the year. It is important to remember that the well owner continues to be responsible for the water quality of water from their well. It should be noted that in his second report, Justice O'Connor [of the Walkerton Inquiry] affirms this position.

Concern for Potential Time Lag Between Well Construction and Pump Installation
The applicants state there is a "potential for highly chlorinated well water to migrate into the groundwater and threaten other down gradient wells" in situations where there is a significant time lag between well construction and pump installation. The previous concentration of 250 mg/L in the regulation was in use for many years and this has not been a reported problem to the ministry of chlorinated well water migrating to other wells. Dilution by groundwater flow removes the likelihood for chlorinated well water migrating into other wells and if concentrations are kept at 50 mg/L, as required by the new regulation, then the likelihood of human health impacts is negligible.

Concern for Vague Standards on Cleaning of Sediment from New Wells
The applicants state that Regulation 903, as amended, will "allow contractors to, in effect, walk away from dirty water in new wells." Sediments, sand, and silt in a well will be disinfected when the chlorine is added to the well water as required in section 15 of the regulation. Section 11(6) of the regulation requires a well to be developed, [i.e., improve the flow of water into the well]. Where the well is not developed to a sand-free state, the person constructing the well must notify

the well owner of the condition and make note of the condition on the well record, which is reported to the Ministry of the Environment. Section 11 (4)(a) of the regulation also requires that on the day the well is completed, the person constructing the well shall provide the owner of the well with a 1 litre water sample from the well for visual examination. It would not be in their own interest, for the well contractor to show the well owner a sample of water that is not sand-free and to record it on the well record. As well, leaving sediments in a well produces a lower yield of water. Furthermore, section 14 (4) of the regulation requires the water-producing-zone to be filled with clean, washed gravel or sand that is, (i.) deposited after placement of the casing, or (ii.) developed, after placement of the casing and sealant, by surging water through the intake zone to remove the adjacent fine grained soils. This is consistent with other jurisdictions who also do not stipulate the removal of all sediments and foreign material from new private wells, e.g., Alberta, Manitoba, Quebec, Indiana, Ohio, and Pennsylvania.

Concern for Apparent Construction Practice for Bedrock Wells

The applicants state that the amendments to Regulation 903 require contractors to introduce sediment into bedrock wells. The statement is incorrect, since the clean, washed sand or gravel of section 14(4)1 is to be placed in the annular space only. There is no annular space in an open hole.

Concern for Not Requiring Contractors to Install Watertight Above-Ground Water Line Connections

The applicants state that Regulation 903 requires that watertight connections are made below-ground but imposes no requirement for above-ground waterline connections. Predominantly, connections are made below ground. Given the climate of Ontario, few waterlines are connected to casing above-ground because they would freeze. If the connection is made above-ground, it is only on a temporary basis before the final grading of new well construction. At the time of construction, if the person constructing the well is aware that the connection is intended to be underground, it is the responsibility of the person constructing the well to make the connection watertight as required by section 17(1) of the regulation.

Concern for Not Requiring Contractors to do Proper Testing for Dangerous Gases

The applicants state that chlorinated well water can generate chlorine gas, which may pose an immediate danger. The applicants also state that Regulation 903, as amended, does not adequately address the risks associated with drilling in bedrock formations where there are naturally occurring gases. Chlorine gas from chlorinated water can only be generated when the pH of the water is below a pH of 5, whereas natural groundwater has a pH well above a pH of 5. In addition, chlorine disinfectants used in wells increase the pH of the well water.

Situations of naturally occurring gas in the province are uncommon. Nothing in the regulation prevents the person constructing the well from using equipment to test for natural gases. It could be onerous to require persons constructing wells to use equipment to test for natural gases in areas where it is known that there is no natural gas occurring. Section 20(2) of the regulation requires the person constructing the well to immediately notify the well owner and MOE where natural gas is encountered. Section 14(7) of the regulation also places an obligation on the person who constructs a well to ensure that the annular space is plugged in order to prevent the movement of water, natural gas or contaminants between subsurface formations or between a subsurface formation and the ground surface. Section 21 (4)(c) and (d) of the regulation requires the well owner to abandon a well that contains natural gas or other gas or produces water that is not potable or permits the movement of natural gas between subsurface formations or between a subsurface formation and the ground surface. Section 21(1)5 of the regulation also places an obligation on the person who abandons a well to ensure that the well is plugged in order to prevent the movement of water, natural gas or contaminants between subsurface formations or between a subsurface formation and the ground surface. Section 18(1)(e) of the regulation states that if natural gas is present, the air vent must extend to the outside atmosphere to release gases that may accumulate in the well.

Concern for Construction Standards for Test Holes

The applicants state that test hole construction "is virtually unregulated" under Regulation 903. The regulation for the first time has many specific requirements for test holes and dewatering wells, including licensing, tagging, record-keeping, and decommissioning requirements. Furthermore, test holes and dewatering wells are required to prevent any movement of water, natural gas, contaminants or other material between subsurface formations or between subsurface formation and the ground surface. The majority of the test holes and dewatering wells are in the ground for a short period of time only (within 30 days of construction). Proper abandonment of these wells is the primary objective. All test holes and dewatering wells must be abandoned properly according to the provisions of Regulation 903. All test holes and dewatering wells over 30 days must be tagged and reported to the ministry. For wells open for more than 180 days, there are applicable requirements in most sections of the regulation. Some of the exemptions of test holes and dewatering wells include:

- Test holes and dewatering wells are exempt from siting requirements because they are typically installed at a location specifically to find contaminants and monitor it.
- Test holes and dewatering wells are exempt from accessibility requirements because they are often located in the footprint of a structure.
- The test holes and dewatering wells are exempt from potability and disinfection requirements because the wells are not intended for drinking. Adding chlorine to the well may change the chemistry of the water in the well they are monitoring.
- The test holes and dewatering wells are exempt from the casing length requirement as they often require short casing lengths.
- Test holes and dewatering wells are exempt from the casing stick-up requirements where they are constructed on highways; in which case, the regulation requires that a flush-mounted watertight commercially manufactured well cover be installed.

Also, test holes or dewatering wells that are made to a depth of not more than 3.0 metres below the ground surface (a "shallow work") are not exempt from the requirements of the regulation if they are constructed in a contaminated area, or if they penetrate an aquitard or if they are constructed in an area with conditions likely to result in flowing wells.

Concern for Not Requiring Contractors to Use All New Materials for Well Construction

The applicants state that Regulation 903 allows contractors to utilize "used" materials, rather than new manufactured products, during new well construction and well repair, particularly well caps and water line connections. Some of the main components of a new well are its casing, the sealant around the outside of the casing, and the well cap. The regulation requires that new casing be used in the construction of a well, and also has specifications for the well cap and for sealants that must be complied with. The well owner has the right to decide whether the pump installed to provide water from the well is new or used. However, after every well construction or repair, the regulation also specifies that the well must be disinfected for a minimum of 12 hours thereby eliminating any bacterial contamination that might have been introduced during the work.

Concern for New Pumping Test Requirements
The applicants state the regulation, as amended, is "far too open-ended" for discontinuing the pumping test, and does not require re-testing when conditions permit. The only acceptable reason for discontinuing the pumping test is when the well does not have a good enough yield of water; for example, pumping from low permeability aquifers. Such well records are reviewed when submitted to the ministry. In addition, if an invalid reason for discontinuing pumping is provided by the well driller, the water well record may be viewed by the ministry as "incomplete" and returned to the driller for correction.

Concern for Description of Well Caps and Well Screens
The applicants state that the current wording of Regulation 903 excludes certain well caps and well screens from use in the province. The requirement for casing in Regulation 903 does not extend to well screens. The ministry will clarify the design requirements for vermin-proof caps.

Concern for Vague Standards for Placement of Seal In and Around Well Casing
The applicants state the amended regulation has interpretive difficulties on well sealant placement. The regulation clearly requires that all annular space that is created around the well casing be sealed from the bottom up to prevent gaps where contaminants could enter the well. Regulation 903 states that, at a minimum, sealant must be placed at the top of the clean washed sand and gravel referred to in subsection 14(4), and upwards so that it completely fills the annular space. The person who constructs a well shall ensure that the annular space is sealed to prevent any movement of water, natural gas, contaminants or other material between subsurface formations or between subsurface formation and the ground surface by means of the annular space. The regulation requires that there be annular space to a depth of at least six metres. Deeper than that, annular space is not required but if you do create an annular space, you must fill it. An overburden well must be cased all the way down to the water-producing zone, and the entire annular space from the top of the well screen to the surface should be filled with suitable sealant.

"Intake zone" for screened overburden wells means the part of the well where water enters the well through the well screen. Intake zone for bedrock wells is either the screened portion of the well if there is a screen or the open bore part of the well.

"Fine-grained soils" refers to the soil material that would normally be removed during the development of a well. Development of a well consists of surging water through a well screen or pumping the well at a high rate.

To ensure that the required minimum width of annular space is obtained when constructing a well, the "proposed diameter of the finished well" must be the actual outer diameter of the well casing of the finished well. Section 14(3) requires that the hole that is constructed for the well be at least 7.6 cm greater in diameter than the outside diameter of the well casing that is installed in the hole. Section 14(5)(b) requires that the hole that is constructed for the well must be at least 5.1 cm greater in diameter than the outside diameter of the well casing that is installed in the hole, if certain provisions are met such as mechanisms for ensuring the casing is centred in the hole. MOE is finalizing a "Guide to 903" which explains the requirement for the placement of seal in and around well casings in plain language.

Concern for the Lack of Full-Time Well Inspectors
The ministry will continue to respond to complaints and take enforcement actions involving water wells where non-compliance by a well contractor may have caused human health or environmental impacts or where there are allegations that environmental legislation has not been complied with.

Concern for the Lack of Adequate Training or Technical Packages to the Well Industry
With regards to training: Under an agreement with Sir Sandford Fleming College of Applied Arts and Technology, a well construction training and education program for well technicians will be available as of January 1, 2004. The training will promote compliance with the new regulation and best management practices for the siting, construction, and decommissioning of wells. The training program is a mandatory 10-day course to be held at the college in Lindsay. Government funding was provided to the college to support training costs for those who construct wells for a period of three years. As a result, well technicians will only have to pay $300 for the 10-day course during this time period. For existing well technicians licensed by the ministry, renewal of licences will be granted only after successful completion of 21 hours of continuing education over a three-year time period. Sir Sandford Fleming College is also developing several continuing education one-day workshops on key topics from the new regulation. The first continuing education modules will be available as of January 1, 2004. Distributed learning versions of the continuing education courses will be included to facilitate access to the courses by drillers living in more remote locations of the province.

With regards to dissemination of technical information to the well industry: On September 23, 2003, MOE posted four updated "Green Facts" information brochures on its Web site for members of the public interested in the new requirements of Ontario's Wells Regulation. The ministry is now distributing to licensed contractors the well tags and a well tag booklet designed to illustrate where the well tag should be attached to different kinds of wells, along with copies of a new Well Record Form. Well Owner Information Packages for well owners of newly constructed wells are being distributed to licensed well contractors by a supplier approved and hired by the ministry (Dyment Distribution Services Ltd.). The contents of the Information Package include Fact Sheets on wells and an educational video ("Well Aware") produced by groundwater stakeholders in partnership with the ministry. The ministry is in the process of finalizing a Guide to Ontario's Wells Regulation 903 that will describe the contents and requirements of the regulation in plain language for well owners. The ministry provided financial assistance to the Ontario Ground Water Association to host four regional workshops for well contractors regarding the new Regulation 903. Meetings were held on November 18 in Sudbury, November 20 in Perth, November 26 at Sir Sandford Fleming College and November

25 in Elora of this year. Ministry staff participated in the workshops and approximately 500 well contractors participated in the workshops.

ECO Comment

The applicants called for a review of Regulation 903 as amended by O.Reg. 128/03, based on a number of reasons, primary of which was that the amendments were not adequate to protect the environment or public health and safety. The applicants represented one of the key environmental groups in the Walkerton Inquiry, the Concerned Walkerton Citizens, and reflected a deep knowledge and concern about the health and safety implications of the revised Wells Regulation. Shortly after the amendments took effect (August 1, 2003) difficulties were reported including the lack of well tags to identify wells and the need for plain language information explaining the revised regulation to assist contractors with implementation. These incidents partly led to the filing of the application to review the amended Regulation 903. MOE denied the request for a review of the regulation for the reasons it provided (largely technical in nature to respond to the technical issues raised by the applicants; see above).

Despite MOE's thorough response, there are several issues which the applicants raised which clearly warrant action by MOE, whether that action entails a limited review, a new proposal or provision of information to the public. These issues include the new chlorine disinfection standard, how MOE will clarify design requirements, e.g., for well caps, delivery of the plain-language guide to Regulation 903, and ongoing enforcement of the amended regulation.

The ministry changed the regulated disinfection standard from maintaining a chlorine concentration of 250 mg/L for 12 hours to approximately 50 mg/L for a 12-hour period. This amendment was based on "new research" according to MOE. Because MOE introduced this into the regulation between the time of the proposal and the decision, the public was unaware of the amendment and unable to comment on it. MOE should provide the technical and scientific justification for this amendment and consider allowing the public to comment on it, or at a minimum post an information notice with the relevant information.

With regard to clarifying design requirements, the applicants noted that Regulation 903 as worded would prohibit the use of a type of vermin-proof well cap. In response, MOE noted that the "Ministry will clarify the design requirements for vermin-proof caps." How this clarification will occur is not clear to the ECO. The ECO encourages MOE to respond promptly.

MOE's intention to publish a plain language guide to Regulation 903 might help deal with various outstanding matters with Regulation 903, such as the need for more information or clarification of certain provisions. If this guide elaborates on well management beyond that specified in Regulation 903, then MOE should consider posting it as a proposal. If it is only a plain language explanation of the revised regulation without new policies or practices, then MOE could post it on the Registry with an information notice. Other MOE processes have included the posting of a proposed guide with the proposed regulations (see review of O.Reg. 116/01 – Environmental Assessment Requirements for Electricity Projects in ECO's 2001/2002 annual report). These combined postings allowed the public to view the guidance material and regulation proposal at the same time. Also, had MOE published its planned guide with this regulation proposal, a number of issues in this application might have been resolved. A guide with diagrams featuring generic well construction and its components and a glossary of definitions used by MOE would have helped the public in commenting on, and implementing these amendments. Without such diagrammatic aids, it can be difficult to know with certainty whether there is a genuine disagreement about a particular point between MOE and the applicants, or whether it involves a misunderstanding on the part of one of the parties. Diagrams occasionally appear within a regulation itself, as is the case with Ontario's Building Code regulation and MOE's General Air Pollution Regulation 346 (R.R.O. 1990).

Another feature of the O.Reg. 116/01 process might have been useful in the Regulation 903 process. When a significant amount of revision to the proposal had occurred in the O.Reg. 116/01 process, it was re-posted for a second comment period. MOE could have considered doing this when it decided to introduce the new disinfection standard into Regulation 903.

It is notable that MOE responded thoroughly to the technical issues raised but refrained from responding to the applicants' issues which identified process concerns as the basis for calling for a review. That is, MOE did not formally respond to certain issues raised by the applicants such as MOE's Statement of Environmental Values ("exercising caution in favour of the environment") warranting the requested review of Regulation 903, or the absence of a periodic review provision within Regulation 903 as the basis for needing the sought after review. MOE's response to the applicants and rationale for its decision not to conduct the review was among the most comprehensive the ECO has ever seen.

It would be prudent for MOE to give consideration to some of the issues raised about enforcement of Regulation 903 in light of the issues raised in this application and by commenters when the Regulation 903 amendments were under consideration. In that process, some municipalities sought the ability to enforce the regulation (through delegated authority) over concern that MOE inspections might not suffice in their jurisdiction. MOE's response to the applicants indicated "The Ministry will continue to respond to complaints and take enforcement actions involving water wells where non-compliance by a well contractor may have caused human health or environmental impacts or, where there are allegations that environmental legislation has not been complied with."

Many of the changes brought about by O.Reg. 128/03 were designed to or have the ability to enhance groundwater protection, increase the accountability of persons who construct wells and improve the understanding of the need for well owners to maintain their wells and plug and seal unused wells. To a significant degree, these enhancements will be contingent on the ministry's ability to properly implement and ensure compliance with O.Reg. 128/03 amendments.

Review of Application R2003009: Review of Public Notice and Signage Rules under the *Ontario Pesticides Act* (Review Undertaken by MOE)

Background/Summary of Issues
In November 2003, the applicants requested a review of section 70 of Regulation 914 under the *Ontario Pesticides Act*, which sets out the rules for public notice and warning signs which must be posted when pesticides are applied to land. The applicants believe that the existing regulation is too vague and leaves too much discretion to the pesticide applicator. The applicants provided a personal case history as evidence. In their case, a commercial pesticide applicator sprayed Cygon on a neighbouring property, but did not personally notify the applicants, or post signs that were visible to the applicants. Within a few weeks of this application, the applicants' dog became extremely ill and died, as did a neighbour's cat. Both animals seemed to exhibit similar symptoms of poisoning.

Ministry Response
On February 10, 2004, the Ministry of Environment agreed to review section 70 of Regulation 914, as requested by the applicants. The ministry expects this review to be completed by February 2005, and the applicants will be notified in writing of the results of the review, within 30 days of its completion.

ECO Comment
The ECO will review the application in the 2004/2005 fiscal year.

Review of Application R2003010: Approvals for the Transfer of Hauled Sewage (Review Denied by MOE)

Background/Summary of Issues
The applicants requested a review of the definition of a transfer of hauled sewage under Regulation 347, R.R.O. 1990 (Reg. 347), under the *Environmental Protection Act* (*EPA*).

One of the applicants was a lawyer representing two small Ontario companies, one of which operated in the sewage haulage business while the other was considering starting a similar business. At the time the application was filed, the first company's method of sewage haulage was to send a small company-owned truck to pump out a septic tank or portable toilet. Once full, the contents of the small truck are pumped into a larger company-owned truck at the company yard. The larger truck then drives to a sewage treatment plant to discharge its contents under an annual permit to discharge liquid material issued by the Ministry of the Environment (MOE).

An alternate process had been used by the company in the past but has been discontinued. In this alternate process, small trucks owned by the company pumped their contents into a temporary holding tank in the company's yard. Once full, the holding tank would be pumped out into a larger company-owned truck and taken to the sewage treatment plant. This process was discontinued after MOE officials informed the company that it needed a permit for a waste transfer station in order to operate in this manner.

The applicants raised the issue of whether this company was required to have a permit for a waste transfer station under Reg. 347. They submitted that their interpretation of the regulation and case law suggests that a permit should not be required. Noting that "transfer" is defined in Reg. 347 as a "physical transfer of possession," the applicants argued that the transfer of waste between vehicles or tanks owned by the same company should not be considered a physical transfer of possession. The applicants made reference to property law, in which the term "transfer" refers to property going from one owner to another. The applicants did not find any case law under the *EPA* where this issue had been litigated.

The applicants also noted that Reg. 347 defines a "transfer station" as "a waste disposal site used for the purpose of transferring waste from one vehicle to another for transportation to another waste disposal site." The applicants argued that because the company does not dispose waste in its yard, it is not operating a waste disposal site and it should not be characterized as a transfer station. The applicants noted that the term "waste disposal site" was not defined in Reg. 347, and submitted that a plain language meaning could not include a site where no disposal occurs.

In conclusion, the applicants submitted that MOE does not have a statutory basis to require the company to obtain a certificate of approval (C of A) for a waste disposal site under s. 27 to 32 of the *EPA*, and that Reg. 347 should be amended to clarify the position of waste haulers that only transfer sewage waste on their private property, and then dispose of waste at sewage treatment plants. The applicants also suggested that unnecessary regulation means that MOE's resources are not available for important environmental protection.

Ministry Response

MOE determined that a review of Reg. 347, in relation to the transfer of hauled sewage from one vehicle to another, or from one vehicle to a holding tank, was not warranted. MOE maintained its position that a C of A for a waste disposal site must be obtained for a site where a transfer of hauled sewage occurs prior to transporting the waste material to another site for final disposal.

Although the phrase "waste disposal site" is not defined in Reg. 347, as indicated by the applicants, MOE pointed out that it is defined in Part V of the *EPA*. S. 25 of the *EPA* defines the term to include any land, building or structure where waste is deposited, disposed of, handled, stored, transferred, treated or processed, and any operation, machinery or equipment used in this context. MOE stated that this definition encompassed a wide range of activities that might occur on a site where waste is managed, and that a "waste disposal site" is not limited to a site where waste is actually disposed. It is MOE's position that both of the activities described by the applicants fall within this definition.

MOE also referred the applicants to s. 27 of the *EPA* which prohibits any person from using, operating, establishing, altering, enlarging or extending a waste management system or waste disposal site unless a C of A has been issued. MOE explained that this was the basis for its requirement that a proponent obtain a C of A in order to manage waste such as a hauled sewage on a site where activities, including depositing, disposing, handling, storing, transferring, treating or processing waste, are to occur.

MOE noted that Cs of A for waste disposal sites stipulate conditions regarding the operation of the site with which site owners must comply. MOE stated that these conditions are included to protect the health and safety of people and the environment. As an example, MOE suggested that potential conditions on a C of A issued for a site where hauled sewage is transferred might be aimed at the prevention of spills or at requiring financial assurance. MOE informed the applicants of the general objectives that Cs of A are intended to accomplish, such as protecting the natural environment by minimizing discharges or spills at waste disposal sites, and encouraging sound environmental practices.

MOE staff considered whether the public interest warranted the requested review of the statutory requirement for a C of A for the sewage haulage business in question. MOE determined that this requirement did not pose potential harm to the environment and, in fact, protected the environment, and therefore that it was not in the public interest to conduct this review.

ECO Comment

The applicants' request for this review was based on a disagreement with MOE as to the interpretation of the *EPA* and Reg. 347. The applicants did not believe that the sewage haulage company's yard should be considered a waste disposal site, nor that a "transfer of possession" had taken place when sewage was transferred between two company trucks, or a company truck and a holding tank.

MOE correctly interpreted the provisions of the *EPA* and Reg. 347 in deciding that the sewage haulage company was required to obtain a C of A in order to transfer sewage in its yard. The applicants' argument that a "transfer of possession" required a change in ownership was incorrect in these circumstances because possession has a different meaning under the *EPA* than in property law. The word "possession" in the context of the *EPA* refers to having a substance in one's control.

The current regulatory regime requires haulers to obtain Cs of A for waste disposal sites under the *EPA* to ensure that haulers maintain proper due diligence and minimize spills and nuisance impacts related to sewage haulage and transfer. MOE made an appropriate decision that it was in the public interest not to conduct this review.

Review of Application R2003014:
Certificate of Approval for the Proposed County of Simcoe Landfill (Site 41)
(Review Denied by MOE)

Background/Summary of Issues

In February 2004, the ECO received an application under the *Environmental Bill of Rights* requesting that the Ministry of the Environment review the certificate of approval (C of A) – the operating permit – for a proposed landfill site in Simcoe County.

The planned landfill, also known as "Site 41," is located near the Town of Midland. The proposal involves landfilling on 21 hectares of land within a total site area of 60 hectares.

The applicants have questioned the appropriateness of developing Site 41 for two main reasons. First, the applicants noted numerous technical issues raised in 2003 by the Ministry of the Environment and several independent technical experts relating to the county's proposed detailed design and operation parameters for the landfill. Second, because of impending changes to Ontario law and policy related to source water protection, the applicants question whether it is prudent to consider the landfill's development. MOE declined to undertake the review, and the ECO disagrees with that decision.

In 1979, a landfill search began for the North Simcoe area that led eventually to the selection of Site 41. Part of that search involved investigating the expansion of an existing landfill site (called the Pauze landfill). However, the Pauze site was rejected because studies showed that it was polluting the drinking water source water for the nearby Village of Perkinsfield. In fact, Perkinsfield was provided with piped water due to the groundwater contamination. The Pauze landfill is located in the vicinity of Site 41, contributing to the ongoing opposition to Site 41.

Following an environmental assessment (EA) approval process, a public hearing about Site 41 was held under the *Consolidated Hearings Act*. In November 1989 the hearing board decided not to approve the landfill site, but Cabinet overturned that decision in June 1990 and required the hearing to resume. Following resumption of the hearing process, the board approved Site 41 in 1995 and issued specific conditions in 1996. Two other legal challenges made after the board's approval ruling were not successful. As a result, MOE issued a C of A for Site 41 in April 1998, contingent on the ministry's satisfaction with an array of technical provisions related to environmental protection that the county would submit in the future. MOE would also have to issue several other environmental permits for landfill development – stormwater management and site dewatering to allow for landfill construction.

In January 2003, the County of Simcoe provided MOE with more information about the proposed landfill site's design and operation, and in March 2003, MOE responded with comments on gull management at the site. The Huronia Airport is only 6.5 km away from Site 41, and Transport Canada's guideline recommends a distance of 8 km in order to minimize the human safety risk of gulls colliding with aircraft.

In June 2003, MOE provided the county with a list of 81 additional comments on the remainder of its January 2003 submission. The ministry was concerned about the need for more assessment of the potential impacts of the landfill on a nearby creek. MOE also urged the county to defer plans to place waste in the northwest corner of the proposed landfilling area until more data were available, or to eliminate that part of the site from the fill area. The ministry was also concerned about the potential impact of off-site pumping of groundwater on the performance of Site 41's leachate collection system. The landfill's design relies on pressure (called an "upward gradient") from groundwater below the proposed site to contain leachate, the contaminated liquid produced by a landfill.

Also in 2003, a peer review by technical experts prepared for local concerned citizens and Tiny Township, the host municipality, identified numerous issues relating to groundwater and surface water protection. While these reviewers noted that the landfill site could be developed if those concerns were addressed, the review comments pointed to the sensitive nature of the proposed site: Site 41's characteristics would "require that more than usual precautions" be "undertaken to design, construct and operate the Site in accordance with stated requirements." Concerns were also expressed about the completeness of the information submitted for review: the "proposed detailed design requirements for the construction of the landfill are inadequate to ensure the appropriate environmental and engineering control during the active life of the landfill." The applicants included a copy of both MOE and peer review comments as part of the *EBR* application for review.

Ministry Response

In declining the applicants' request for a review, MOE indicated that the county had responded to many issues the ministry raised in 2003. However, MOE acknowledged that follow-up reports remain outstanding on the following issues: gull management, surface water discharge from landfill construction activities, and the capacity of local wastewater facilities to accept leachate. The ECO notes that these matters remain unresolved six years after the C of A established the information requirements.

Several key changes to Ontario's regulatory framework related to source water protection sit on the horizon and partially formed the basis of the applicants' request for review. In February 2004, MOE released a draft policy paper on source water protection to implement recommendations made by Commissioner O'Connor in the Report of the Walkerton Inquiry. That paper outlines the province's intent to develop source water protection legislation so that watersheds across Ontario have plans in place to protect that water. In future, sound water management decisions will be based on an understanding of the relationship between water quality, water use, and conditions within the watershed, and that effective protection programs will be built on accurate and representative assessments of threats to the water source. The ministry also proposes to strengthen its rules for approval of watertakings by the end of 2004. The ECO notes that these new rules could have a bearing on the plans to dewater the site, necessary for the construction of the landfill.

In denying the application, MOE told the applicants that a review of the C of A was already under way and that undertaking the review would create a duplicate exercise. MOE's narrow view is unfortunate. The ministry's consideration of the landfill's design and operation focuses on specific technical factors. As well, MOE's intention to review the C of A in light of existing policies, Acts and regulations does not address the applicants' request that MOE broadly consider the merit of developing Site 41 in light of the impending changes to Ontario's regulatory framework on source protection. The approach to source protection being considered by MOE was not part of MOE's approach to watershed management in the mid-1980's when the hearing board issued its approval for Site 41 or in 1998 when MOE issued the C of A. Thus, the broader review requested by the applicants would not constitute a duplicate exercise.

The ministry's denial of the application also stated that MOE consulted with the public, especially the local community, on all ministry approvals related to the North Simcoe Landfill

Site 41, and that MOE would continue to involve the public in the approvals process. The ministry also noted that the public participated in the process to select the landfill site, and in the subsequent hearing.

The ECO observes that many of the technical details related to the landfill's design and operation were not available during the landfill siting process or at the hearing. Due to an exception found in section 32 of the *Environmental Bill of Rights*, MOE is not required to post proposal notices for these types of Cs of A, or to require the ministry to explain publicly how it has addressed any citizen concerns (see pages 52-59 of this annual report for more detail). For information, the public must rely on any forums organized municipally or by the community monitoring committee – the "CMC," which is made up of several municipal representatives and citizens living within three kilometres of Site 41.

As a related problem, the CMC alleges it was kept in the dark about the County of Simcoe's plans to seek approval for a stormwater management system at Site 41. The county did not provide the CMC with copies of the application documents sent to MOE in April 2003, nor with copies of correspondence between the ministry and the county relating to the application. This communication continued until January 2004 when MOE issued an approval under the *Ontario Water Resources Act*. A Registry notice would have provided transparency and an opportunity for public input into another environmentally significant aspect of the proposed landfill site.

ECO Comment

The ECO believes that a broad review of the Site 41 C of A was warranted to increase government accountability for environmental decision-making on this highly contentious proposal. It would have been appropriate for the Ministry of the Environment to evaluate the certificate of approval in light of the province's intention to strengthen source water protection requirements.

For information about two earlier requests for review of the Site 41 certificate of approval, please refer to pages 225 to 231 of the ECO's 2001/2002 Supplement to the annual report.

Review of Application R2003015: Wood Wastes as Designated Wastes under the *Waste Diversion Act*

(Review Denied by MOE)

Background/Summary of Issues

In March 2004, the ECO received an application requesting that the Ministry of the Environment (MOE) consider including waste wood as a "designated waste" under the *Waste Diversion Act* (*WDA*). As a designated waste, wood waste would fall under the mandate of Waste Diversion Ontario (WDO) and would require the development of a waste diversion program likely by an industry association. The WDO is a permanent non-governmental corporation established under the *WDA* with the mandate of developing, implementing and funding waste diversion programs.

On December 22, 2003, Environment Minister Leona Dombrowsky announced that the ministry planned to phase in a ban on organic wastes in Ontario landfills in a plan to "drastically reduce landfill use." The applicants note that currently most wood waste in Ontario is picked up by disposal companies and landfilled. They note that wood waste can be used to manufacture dust-free animal bedding and that wood fibres can be used to manufacture composite wood. The applicants believe that in order to encourage diversion of wood waste from landfill sites, wood waste should be a "designated waste" under the *WDA*.

Ministry Response
In April 2004, the Minister of the Environment wrote to the applicants in response to an e-mail and suggested that they "first approach industry associations to discuss options around recycling wood waste." In June 2004, the ministry denied the application for review.

ECO Comment
The ECO will review the handling of this application in our next annual report.

Review of Application R2003016: Waste Asphalt Roofing Shingles and Waste Industrial Roofing as Designated Wastes under the *Waste Diversion Act*
(Review Denied by MOE)

Background/Summary of Issues
In March 2004, the ECO received an application requesting that the Ministry of the Environment (MOE) consider including waste asphalt roofing shingles and waste industrial roofing as a "designated waste" under the *Waste Diversion Act* (*WDA*). As a designated waste, waste asphalt roofing shingles and waste industrial roofing would fall under the mandate of Waste Diversion Ontario (WDO) and would require the development of a waste diversion program likely by an industry association. The WDO is a permanent non-governmental corporation established under the *WDA* with the mandate of developing, implementing and funding waste diversion programs.

Currently most waste shingles in Ontario, weighing several hundred thousand tons, are landfilled each year. The applicants believe that a significant decrease of waste shingles being landfilled could result if a diversion program was developed to recycle shingles. They note that waste shingles have been used since 1986 to pave roads and can be used in Hot Mix Asphalt paving. According to the applicants, ground shingles can also be used as a dust suppressant on rural roads and, if mixed with gravel, can prevent washouts. Shingles also can be used in the waterproofing industry to produce protection board.

Ministry Response
In April 2004, the Minister of the Environment wrote to the applicants in response to an e-mail and suggested that they "first approach industry associations to discuss options around recycling roof shingles." In June 2004, MOE denied the application for review.

ECO Comment
The ECO will review the handling of this application in our next annual report.

MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING

Review of Application R2003013: Mineral Aggregate Availability in the Provincial Policy Statement

(Review Denied by MMAH)

Background/Summary of Issues
In February 2004, the applicants filed an application for review with the Ministry of Municipal Affairs and Housing (MMAH) requesting that it consider changing s. 2.2.3.1 of the Provincial Policy Statement that states, "As much of the mineral aggregate resources as is realistically possible will be made available to supply mineral resource needs, as close to markets as possible."

Ministry Response
MMAH denied the application for review as it is already reviewing the Provincial Policy Statement, as required every five years by the *Planning Act*. However, the ministry did state that it would consider the applicants' concerns as part of this ongoing review.

ECO Comment
The ECO will review the ministry's decision and handling of this application in the 2004/2005 reporting period.

Review of Application R2003017: *Planning Act* and Mineral Aggregate Extraction

(Review Denied by MMAH)

Background/Summary of Issues
The applicants requested that an amendment be proposed to the *Planning Act* (*PA*) that would eliminate the right to appeal mineral aggregate extraction applications under the *PA* that are not supported by a municipal council. This would extend the government's current proposal in Bill 26, the *Strong Communities (Planning Amendment) Act, 2003*, to amend s. 22 of the *PA* to eliminate appeals to the Ontario Municipal Board for proponent-led Official Plan and zoning by-law amendments for urban settlement area boundary alterations or new settlement areas not supported by a municipal council.

Ministry Response
In May 2004, MAH informed the applicants that their application did not warrant a separate review under the *EBR*, but would be considered as part of the Bill 26 and planning reform public consultation and review process.

ECO Comment
The ECO will review the handling of this application for review in the 2004/2005 reporting period.

MINISTRY OF NATURAL RESOURCES

Review of Application R2002009:
Review of Guidelines for Roadless Wilderness Areas
(Review Denied by MNR)

Background/Summary of Issues

In February 2003, the Wildlands League and Sierra Legal Defence Fund (SLDF) submitted an application for review centering on the planning and management of logging road networks in Ontario's public forests, the need for access controls, and the preservation of roadless wilderness areas. The applicants requested that the Ministry of Natural Resources (MNR) and the Ministry of the Environment (MOE) review all existing policies, Acts, regulations, and instruments as well as considering the need to develop new legal mechanisms if necessary.

The Wildlands League and SLDF based the need for such a review on their field investigation and report, *The Road Less Travelled?* The report is based on a case study of the Temagami forest. The applicants state that Temagami was chosen because of its large number of access controls and a 1997 land use plan that created several special management areas with the twin goals of forest resource extraction and the preservation of remote values.

As background information, the applicants state that there were 33,000 km of logging roads dissecting Ontario's publicly owned forests as of 1987, with an average of 1,700 km of new road being built each year. However in the last operating year for which information is available (1999/2000), this figure decreased to 528 km of new road being built. As of 1998, there were only 40 roadless areas larger than 200 km^2 remaining in the half of Ontario that allows forest management. Only four areas over 1,000 km^2 still existed in Ontario's managed forest outside of parks. The Wildlands League and SLDF are concerned that Ontario is rapidly running out of forest that is free from the significant impacts of roads.

Logging roads provide access to the forest for other uses. Although some of these uses like camping and canoeing generally have a modest environmental impact, others like mineral exploration and extraction, as well as motorized hunting and fishing, have the potential to create significant negative impacts on ecosystems. In 2001, MNR estimated that approximately 80 per cent of the logging road network is open to public use in Ontario.

The Wildlands League and SLDF presented an extensive array of scientific evidence that demonstrates the ecological impact of roads. Roads fragment the landscape, creating permanent access that threatens the diversity of forest ecosystems through a variety of direct and indirect human impacts. For example, species whose presence is indicative of ecological integrity, such as caribou, avoid densely roaded areas. Further, roads are often migration routes for invasive plant species that were previously unable to penetrate interior forest habitat. Even populations of fish are not immune to the impacts of logging roads as one study has confirmed that creating motorized access to lakes can cause lake trout populations to plummet abruptly due to increased angling activity.

Twenty-one known access controls exist in the Temagami Forest Management Unit. These controls were established to retain the quality of remote tourism and recreation. A variety of methods were used by MNR to restrict public access including signs, cables, gates, bridge removal, and the creation of physical obstacles like ditches and berms. The applicants' investigation demonstrated a high incidence of access control violations in Temagami, revealing a 55 per cent violation rate. Similarly, according to the Wildlands League and SLDF, a conservative estimate of violation frequency from MNR inspections was 45 per cent in the 14-year period from 1977 to 2000. The applicants believe that this pattern is particularly troubling because the access controls and the Special Management Areas are meant to balance the needs of various forest users and protect ecological dynamics.

The applicants believed that the recommendations from their study are applicable to all of Ontario's public forests, especially those that are currently suffering from poorly planned road-building activities, and poorly planned and enforced access controls. The recommendations also apply to Ontario's few remaining roadless wilderness areas and have particular relevance to the newly established Enhanced Management Areas that were designated to protect remote values.

The Wildlands League and SLDF made the following recommendations involving roadlesss areas, remote area and roads planning, and controlling access:

- MNR should complete its provincial policy on roadless wilderness areas, as legally required by the Class Environmental Assessment for Timber Management on Crown Lands in Ontario. This revised policy should focus on the protection of the remaining roadless wilderness areas on the intervening landscapes outside parks and protected areas.

- MNR should articulate clear rules for road planning, construction, decommissioning and access controls in Special Management Areas in Temagami and Enhanced Management Areas and other sensitive areas elsewhere in Ontario in order to protect the remoteness for which these areas were designated.

- MNR should require the development and maintenance of comprehensive access management plans for each forest management unit, which outline specific objectives and strategies for retaining roadless areas and remote access areas. The challenges of successfully controlling access should lead to strategic decisions to limit road construction, road density, and access to remote and sensitive areas.

- To ensure that access controls are fully effective year round, controls must apply to all motorized vehicles including snowmobiles.

- Forest management planners should rely on avoiding sensitive remote areas (for example, remote lakes with healthy and desirable fisheries) rather than relying on enforcement of use restrictions which may be difficult or ineffective.

- Once a decision has been made to protect remoteness and restrict access in an area, the following strategy should be employed in decreasing order of preference: avoid road building in the designated area; choose appropriate road locations; employ only effective access controls at appropriate locations; and, increase enforcement and fines for access violations.

- The approach to effective road planning and management needs to be tailored to the situation at hand. For example, in already accessed lands, more emphasis needs to be placed on decommissioning roads and implementing and enforcing access controls. In areas where access is still in the planning stages, more attention should be placed on creating a workable access strategy that includes carefully selecting access points that will allow for more effective restrictions (e.g., creating only one entrance to a newly accessed area, which can be later decommissioned). This will reduce access control problems in the future.

- MNR should increase its enforcement capacity and capabilities with respect to violations of road restrictions. Higher enforcement rates, fines and other penalties are needed. The public needs to know that such violations are serious and thus be deterred from committing them. This approach to deterrence should be complemented by an educational campaign that helps the public understand why restrictions are needed to protect the forest ecosystem. The ministry should undertake a review of its existing laws and policies related to access and propose any legislative and regulatory changes necessary to ensure better compliance with access controls.

The applicants believed that MNR and MOE should incorporate these recommendations into any ongoing review of forestry guidelines, regulations and policies, including the Timber Class Environmental Assessment (EA) Review or they should consider initiating an entirely new review. The Wildlands League and SLDF asserted that this review under the *EBR* is necessary as the need for planning and management of logging road networks is not properly addressed by the Timber Class EA Review. They also believed that other related issues, such as access control violations and the need for a roadless wilderness policy, are inadequately addressed.

The Wildlands League and SLDF contend that harm to the environment would result from a failure to undertake this review. The applicants state that it is scientifically well-documented that the building of roads and ineffective access controls can cause the following adverse effects: changes in the nature of wildlife interactions; waterflow redirection; changes in ground water levels; loss of habitat for plant and animal species, including endangered species; fragmentation of forest habitats; colonization of new areas by invasive plant species; increased predation by predators such as wolves and coyotes that travel through new road corridors to previously inaccessible areas; increases in unregulated hunting and fishing; roadkill; increased harmful emissions within forest ecosystems; increased disturbances from noise, dust, exhaust etc.; increased salinity in ditches and waterways; and, the erosion of soil.

The Wildlands League and SLDF also state Condition 106 of the Timber Class Environmental Assessment required the MNR to develop a provincial policy on roadless wilderness areas by May 1997. In response, MNR released Ontario's Approach to Wilderness: A Policy in 1997. The Timber Class EA Review recommended that Condition 106 be deleted as Ontario's Approach to Wilderness has been implemented and represents the provincial policy on roadless wilderness areas. However, the applicants believe that the 1997 policy fails to adequately deal with areas located outside protected lands. The applicants point out that MNR's policy focuses on using parks to meet roadless wilderness objectives whereas the requirement of Condition 106 was to develop a provincial roadless policy for the entire Area of Undertaking for forestry operations. Therefore, the applicants conclude that there are no rules in place for preserving roadless wilderness areas in the managed public forest.

The applicants state that although MOE ruled in April 1999 that Ontario's Approach to Wilderness fulfills Condition 106, the Environmental Commissioner of Ontario (ECO) pointed out in its 1999/2000 annual report that this decision contradicts a 1997 letter from MOE indicating their dissatisfaction with the policy fulfilling Condition 106. The ECO also noted that when MOE takes actions outside the *EBR* application process, such as writing the 1997 letter, MOE is in effect reflecting concerns with the MNR's implementation of the Timber Class EA. However, the ECO stated then that "it appears that MOE is reluctant to admit that to the public and to the ECO through the *EBR* application process" and that "[c]ircumventing the applications process removes the public's rights under the *EBR*."

Regardless of the differing views on whether the MNR is in legal compliance with Condition 106 of the Timber Class Environmental Assessment, the applicants state that it is clear that a proper roadless policy for lands outside of protected areas is needed. The protection of wilderness areas is critical to the protection of Ontario's diverse ecosystems. Protecting wilderness values cannot be accomplished without the designation and protection of roadless areas in both the managed landscape and in protected areas. Unless a roadless policy for areas outside of protected lands is quickly created and enforced, there will soon be little roadless wilderness left to protect, according to the applicants.

Ministry Response

MNR denied this application for review. The ministry stated that the public interest does not warrant a review of the issues raised by the applicants as they have been dealt with in the Ontario's Approach to Wilderness Policy in 1997, Ontario's Living Legacy (OLL) in 1999, the Management Guidelines for Forestry and Resource-based Tourism in 2001, and the renewal of the approval of the Class Environmental Assessment for Timber Management on Crown Lands in 2003. MNR states that all of these policies have improved the system of managing forest access roads and mitigating their environmental impacts.

MNR does state that the location and use of access roads by motorized vehicles can have a significant effect on natural and human forest values. However, the ministry claims that it has effective systems in place for mitigating the environmental impacts of forest access roads and there is a minimal risk in not conducting the review. MNR states that land use and forest management planning consider these needs and provide for the protection of remote values, while at the same time balancing the need to support economic and social benefits of roads. MNR asserted that its forest compliance and enforcement policies are periodically reviewed and that the most recent review was undertaken in 2002. Compliance of forest operations is monitored on an ongoing basis and independent forest audits are conducted every five years.

MNR stated that it has been reviewing the system for managing forest roads and water crossings. According to the ministry, the purpose of this review is to clarify civil and environmental risks and liabilities, define best practices to ensure due diligence, define procedures to ensure compliance; develop a methodology to assess roads and water crossings; and recommend changes to policies and planning. MNR provided no details about the review process, timing, or opportunities for input, except to say that it was near completion.

MNR states that it will consider the issues raised by the applicants in its assessment of the effectiveness of the Management Guidelines for Forestry and Resource-based Tourism. The ministry states that this review is scheduled to begin in 2006.

The ministry met the technical requirements of the *EBR* in handling this application. MNR received the application on February 26, 2003 and provided the applicants with a decision on April 28, 2003. The application for review appears to have been handled by an environmental planning analyst with the ministry.

ECO Comment

The ECO disagrees with MNR's decision not to undertake this review. The applicants raised several fundamental issues that were not addressed by the ministry. The primary basis of MNR denying this review was its assertion that a suite of policies and programs already deal with forest access roads and roadless wilderness areas. However, what the Wildlands League and SLDF were challenging was the scope, effectiveness, and implementation of the existing policies due to the apparently high rate of access violations. The applicants state that MNR's own records of access violations confirm their findings. Further, the ECO's review of forest management plan audits and MNR documents also reveals a similar pattern of access violations. Clearly, the system that is in place is not working.

MNR said that Independent Forest Audits (IFAs) are considered by MNR as a source of information for determining the need for changes to policy and program direction, but it did not acknowledge that access violations have been highlighted in many IFAs. The Temagami Independent Forest Audit published in 2002 confirmed the applicants' findings, concluding "there is a serious problem with poor access control in Temagami," and that "the government needs to lead a re-examination of this problem… It may also be necessary to consider one or more of improved planning, education and awareness, higher penalties and increased enforcement."

MNR's State of the Forest Report 2001 provided a wrap-up of major problems identified by 31 independent audit reports completed between 1996 and 1999. The report noted that instances of non-compliance continue to be a problem, including water crossings. Older abandoned roads are in various states of disrepair, and the public continues to use them, leading to safety concerns.

Similarly, MNR mentioned that "a review of the forest roads and water crossings management system is near completion," and said that it may result in some policy and planning modifications. But MNR did not suggest that the applicants' concerns would be addressed in that review. The Forest Roads and Water Crossing Initiative – joint MNR-forest industry Task Team Report was posted as an information notice on the Environmental Registry in December 2003. Its executive summary acknowledges the problems raised in *EBR* investigations, Independent Forest Audit recommendations, environmental group investigations; and complaints about the status and conditions of forest roads. The report recommends some significant changes to the legislative and policy framework.

The ECO urges MNR to ensure that all aspects of its Forest Roads and Water Crossings Initiative be conducted with full public and stakeholder participation. Some recommendations will be implemented through forest management planning and were incorporated into the Forest Management Planning Manual revisions posted on the Registry in November 2003. MNR intends to carry out a one-time, stand-alone consultation exercise to develop road use strategies for all forest access roads, outside of the FMP process, using the Class EA for MNR Resource Stewardship and Facility Development Projects. This significant project should involve public notice and comment through the Registry. Similarly, the Task Team Report recommends reviewing and revising all of the forest management policies and guidelines which the applicants asked to have reviewed. The ECO reminds MNR that revision of these guidelines should also require notice on the Registry for public comment.

The Timber Class EA, including its recent revision, is at the heart of this issue. Condition 106 of the Timber Class EA of 1994 required MNR to develop a provincial policy on roadless wilderness areas within three years. In 1997, MNR released Ontario's Approach to Wilderness: A Policy. However, this policy did not appear to meet the terms of the class environmental assessment. This policy did not address roadless wilderness areas in the Area of Undertaking for commercial forestry as it primarily deals with those already found in protected areas – areas already closed to forestry.

It is the position of MOE and MNR that Ontario's Approach to Wilderness policy did meet the requirements of Condition 106. As such, MNR recommended to MOE in its review of the Timber Class EA that this condition be dropped. MNR states that the wilderness park class target had been achieved to the extent possible within the OLL planning area and that "by definition, wilderness parks and wilderness zones in other types of parks are roadless." However, the ECO observes that OLL did not in fact create any new wilderness class parks and, therefore, did not significantly affect the quantity of roadless wilderness areas in the province.

Another way of looking at this issue is that the applicants asked for a review of the 1997 policy. The Ontario's Approach to Wilderness: A Policy is more than 5 years old, and, given that MNR had committed to MOE to revisit it in 1998, is ripe for review. The ECO agrees with the applicants that MNR should review the 1997 Ontario's Approach to Wilderness Policy with a view to completing its policy for addressing roadless wilderness outside of parks and protected areas.

MOE received over 500 comments during the Class EA review protesting the deletion of condition 106, and requesting a condition requiring MNR to develop a policy to maintain roadless areas outside of parks and protected areas. These comments came from disparate stakeholders such as environmental groups, tourism associations, and foresters, as well as hundreds of form letters.

MNR's new Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario states that road planning shall include the "consideration of reasonable use management strategies which include public access provisions or restrictions, maintenance provisions and, where appropriate, abandonment provisions." Planning must also occur for any "preventive and mitigative" measures for water crossings, "including a recommendation on the future removal of the crossing structure, if the road is planned to be abandoned." Further, the revisions by MNR to the Forest Management Planning Manual in 2003 now identify roadless areas by default as it is a requirement to map all existing roads.

The ECO believes that the recent revisions to the Timber Class EA and the Forest Management Planning Manual do not sufficiently address roadless wilderness areas within the Area of Undertaking. The ECO encourages MNR to consult on and develop a policy that explicitly addresses roadless wilderness areas and forest road access within the Area of Undertaking for forestry operations, including the provision of sufficient resources to enforce and monitor the field-based results of such a policy.

Review of Application R2002012: Aquaculture in Georgian Bay – Escapement, Enforcement and Fines (Review Denied by MNR)

Background/Summary of Issues

The applicants requested a review of the existing policies and regulations for open netcage aquaculture in Georgian Bay public waters as a result of concerns regarding:

- Water quality
- Environmental monitoring
- Nutrients from fish waste and uneaten food
- Escapement (escape of caged fish) and its potential genetic impact on native fish
- Enforcement and fines.

In support of their application, two substantial reports were provided by the applicants. Since the applicants raised concerns related to the policies and regulations of three ministries, the submission was handled as three separate applications. The ECO forwarded the applicants' request for a review of the *Nutrient Management Act* due to concerns about nutrients from fish waste to the Ontario Ministry of Agriculture and Food. Concerns regarding the policies and regulations for water quality and environmental monitoring were forwarded to the Ministry of the Environment. Lastly, concerns regarding the policies and regulations for escapement from open netcage aquaculture operations, and enforcement and fines related to freshwater netcage aquaculture were sent to the Ministry of Natural Resources (MNR) and are discussed below. Please refer to pages 179-180 and 205-207 in the Supplement for a description of the responses from the other two ministries.

The applicants noted that the eastern shoreline of Georgian Bay is primarily used for recreational activities, as a source of drinking water and as a receiver of domestic sewage. However, a decline in walleye and bass yields, changes in water clarity, the appearance of zebra mussels and periodic high concentrations of *E. coli* have raised questions regarding the consequences of increasing development activity, fish farming and dredging activity in the area.

It is the applicants' understanding that MNR has an "arrangement" with the federal Department of Fisheries and Oceans for enforcement of regulations pertaining to escapement of fish from aquaculture operations. In particular, they asked that this arrangement be reviewed and asked for evidence of enforcement. They also asked that the appropriateness of fines that were levied be reviewed.

The applicants have been advised by the Lake Huron Fisheries Management Unit of MNR that approximately 100,000 to 200,000 fish are reported to have escaped into Lake Huron annually, but that many more escapements go unreported. The applicants are concerned that the impact of escapement on the native fishery is not understood, and that no research is being done to determine the impact.

Ministry Response

In its response on May 2, 2003, the Ministry of Natural Resources advised the applicants that it was denying the request for review. In its response, MNR noted that it had considered it's Statement of Environmental Values, the potential for harm to the environment if the review was not undertaken, the fact that matters under review are otherwise subject to periodic review, and whether or not other evidence existed when it made its decision.

MNR stated that when it receives an application for an aquaculture licence, the application is reviewed according to MNR's interim four-stage site application process, and includes a site approval, a mandatory *Environmental Assessment Act* screening and an *EBR* notice which provides the public with an opportunity to comment. As a result of these processes, concerns regarding the potential impact of the aquaculture operation on the environment are identified and addressed in the licence. MNR also noted that licences are only issued to those operations that pose an acceptable risk, and that licences include mandatory monitoring and annual reporting requirements. Since aquaculture licences are only valid for five years, licences are already subject to periodic review, and therefore conducting this review is unnecessary.

MNR advised the applicants that it is responsible for addressing concerns regarding escapement, including enforcement, fines and potential effects on native fisheries. MNR clarified that escapement is not an offence under the *Fish and Wildlife Conservation Act* or its regulations, and that there is no arrangement with the federal Department of Fisheries and Oceans regarding enforcement of regulations pertaining to escapement of fish from aquaculture operations. MNR, however, did state that all aquaculture licences include conditions that require operators to report escapements of fish, and that such reports are considered when a licence is renewed and may trigger cancellation of a licence.

MNR also clarified that several federal laws prohibit the use of transgenic fish in aquaculture operations in Ontario. MNR explained that rainbow trout is the only species of fish currently licensed for open water cage aquaculture in Ontario and that it had conducted a review of the risks of escapement in 1997-1998. The study concluded that, since rainbow trout are already naturalized through stocking programs in all open waters where there are aquaculture operations, the risk of genetic and evolutionary consequences of escapement are not a major concern.

MNR advised the applicants that it continues to enhance its understanding of the environmental impacts of aquaculture including escapement.

ECO Comment

MNR provided a lengthy response to the applicants and included commentary on a number of the concerns raised by the applicants. However, the ECO does not believe that the reasons given by MNR for denying the application are appropriate, nor did MNR adequately respond to all of the concerns raised by the applicants.

MNR noted that it is using an interim four-stage site application process for reviewing applications for aquaculture licences but provided no information about this process. As a result it is not possible for the applicants or the ECO to assess whether or not some of the applicants' concerns are being addressed as part of the normal licensing approval process. The ECO believes that MNR should have provided a copy of the interim process to the applicants as part of its response. In addition, MNR should post the interim process on the Registry for notice and comment. In May 2004, MNR advised the ECO that it expects to post a decision notice for a proposal (PB00E6001) that has been on the Registry since February 2000 about aquaculture policies and procedures under the *Fish and Wildlife Conservation Act* soon.

MNR also indicated in its response that all applications for aquaculture licences are posted on the Registry for public notice and comment. However, a review by the ECO indicates that no application has been posted by MNR since it became a legal requirement in September 2001 for certain aquaculture licence applications, including applications for cage operations in water covering Crown Land, be posted on the Registry. MNR has advised the ECO that it posts aquaculture licence applications on the Registry only after they pass the preliminary screening stage. MNR also advised that no application has proceeded past this stage as of May 2004.

Although MNR's response clarified a number of issues raised by the applicants, it failed to adequately address others. MNR did clarify that it is responsible for issues associated with escapement and explained that escapement is not an offence. In addition, MNR explained that transgenic fish are not approved for aquaculture in Ontario. However, MNR failed to explain that failure to comply with conditions in the licence with respect to escapement is an offence or provide any reasons why it didn't need to review its policy with respect to fines. It also did not provide any evidence that conditions in licences related to preventing and reporting escapements are being enforced. In addition, although MNR did indicate that it is participating in research related to aquaculture, no details were provided to support this statement.

In our 2000/2001 annual report, the ECO raised the same concerns about escapement as the applicants and urged the government to "ensure that the aquaculture industry is sufficiently regulated to protect the environment." To-date, no action has been taken. The ECO believes that the applicants wanted their concerns addressed at the policy and regulatory level rather than at the licensing level. Although the applicants have raised significant concerns about the adequacy of the current policies and regulations for aquaculture, MNR has failed to recognize these. The ECO believes that it is inappropriate to rely on the licence approval process to compensate for these inadequacies.

Review of Application R2002015: Review of Ontario Regulation 73/94 to Prescribe the *Fish and Wildlife Conservation Act* for Applications for Review under the *EBR*
(Review Returned by MNR)

Background/Summary of Issues
In March 2003, the Ottawa Valley Chapter of the Canadian Parks and Wilderness Society (CPAWS) and Earthroots jointly filed an application for review of Ontario Regulation 73/94. This regulation specifies which ministries and Acts are subject to the *Environmental Bill of Rights* (*EBR*). The applicants requested s. 6(2) of Ontario Regulation 73/94 be repealed in order that the *Fish and Wildlife Conservation Act* (*FWCA*) be prescribed for applications for review under Part IV of the *EBR*. This application was sent to both the Ministry of Natural Resources (MNR) and the Ministry of the Environment (MOE).

There are currently 21 Acts prescribed for applications for review under the *EBR*. The *EBR* allows "Any two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister." Section 6(2) of Ontario Regulation 73/94 specifically excluded the *FWCA*, and its associated regulations, from applications for review under *EBR*. The applicants state that there is no justification for its exclusion.

CPAWS and Earthroots contend that prescribing the *FWCA* for the purposes of applications for review is consistent with the general purposes of the *EBR*. The *EBR* states that, "The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations. While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner."

The applicants also state that the *FWCA* is the primary legal mechanism for the conservation of Ontario's fish and wildlife populations. CPAWS and Earthroots assert that it is an environmentally significant statute as the *FWCA* regulates activities such as hunting, trapping, fishing, and wildlife rehabilitation.

The applicants state that the environmental significance of the Act has been recognized by several Ministers of Natural Resources and the Environmental Commissioner of Ontario. Additionally, public comments received on previous MOE proposals to amend the regulation also were supportive of making the *FWCA* subject to Part IV of the *EBR*. Therefore, CPAWS and Earthroots argue that the full public participation provisions of the *EBR* should apply to the *FWCA*.

The applicants also requested that ss. 3 and 9 of Ontario Regulation 73/94 be amended to accurately reflect existing legislation. At the time of this application for review, Ontario Regulation 73/94 still listed the *Game and Fish Act* rather than its replacement, the *FWCA* that came into force in January 1999.

Ministry Response
MNR returned the application stating that it was not responsible for the administration of the *EBR*. However, MNR stated that it would cooperate fully with MOE in determining whether a review of Ontario Regulation 73/94 was necessary.

ECO Comment
The ECO finds that MNR's return of this application was acceptable given that the ministry committed to cooperating with MOE in its review of the regulation. This type of inter-ministerial cooperation is essential when MOE is reviewing the prescription of statutes under *EBR* that are administered by other ministries. In this case, the *EBR* is administered by MOE and the *FWCA* is administered by MNR.

Review of Application R2003003:
Ontario Forest Industry Compliance System
(Review Denied by MNR)

Background/Summary of Issues
In April 2003 the applicants submitted a request for a wide-ranging review of the compliance self-inspection system adopted by the Ministry of Natural Resources (MNR) for the Ontario forest industry beginning in April 1998. MNR's Forest Management Business Plan laid out a new compliance program in which Sustainable Forest Licence (SFL) holders would plan and carry out compliance inspections and report to MNR. MNR staff would conduct spot-checks, audit industry inspections and carry out enforcement activities. All SFLs were amended to require the licensees to take over these responsibilities on April 1, 1998.

The application for review was based on the Pembina Institute's 75-page report "Industry Self-Inspection and Compliance in the Ontario Forest Sector," which was submitted as supporting evidence. The Pembina Institute evaluated the adequacy of the legal and policy framework, the capacity of the industry and MNR to carry out their responsibilities, and the effectiveness of the self-inspection system to date. The following are some of the key issues raised:

Capacity of SFL Holders to Undertake Inspections
The applicants stated that training and certification are not mandatory for industry inspectors, and the ministry does not assess the capacity of industry inspectors and SFL holders to take on inspection responsibilities. They stated that the level of detail in independent audit reports about inspection and compliance issues varies widely from no discussion at all to detailed assessments.

Ministry Capacity to Oversee Industry Performance
The Pembina report questions MNR's capacity to oversee the self-inspection regime, citing critical findings from internal and external reviews of MNR's ability to perform its role and responsibilities. They state that MNR staff engaged in forestry inspection-related activities fell from 139 full-time equivalents in 1995 to 45.5 in 2003, a 67 per cent reduction. This amounts to less than one MNR inspector per management unit or per 550,000 hectares of Crown forest under licence.

Performance Evaluation

The applicants analysed available MNR data on forest operations compliance inspections from 1996/97 to 1999/2000. They alleged that MNR inspectors identify instances of non-compliance at a much higher rate than industry inspectors. The applicants stated that the ministry has itself noted in its Annual Reports on Forest Management that SFL holders may not report all violations due to differences in interpretation between MNR and company inspectors and in some cases, industry will remedy a situation and deem an infraction too minor to report.

The applicants noted that, although the total number of inspections increased, reported compliance rates have declined significantly and the proportion of non-compliance considered "significant" has risen. The applicants are concerned that these figures may underestimate the extent and significance of instances of non-compliance. The applicants allege that, contrary to MNR's stated position, companies do contribute to the determination of a violation's significance. The applicants state that SFL holders are in a conflict of interest in exercising this discretion.

Oversight by the Public

The applicants state that SFLs and other timber licences issued under the *Crown Forest Sustainability Act* (*CFSA*) are not required to be made available to the public. MNR did not classify SFLs or other major licences or instruments under the *CFSA* for the purposes of the *Environmental Bill of Rights* (*EBR*). As a result, there remains no right of public notice and comment under the *EBR* on the issuance or amendment of SFLs or other licences.

Specific Requests for Review of Acts, Regulations, Policies and Instruments

The applicants requested review of specific sections of the following:

- The CFSA, 1994
- The general regulation, O.Reg. 157/95
- Forest Information Manual provisions related to source data, access to information, and to forest operations compliance information
- All SFLs and the section of the Generic SFL related to Compliance Planning and Monitoring
- The Forest Compliance Handbook and several of its policies and procedures, including those related to the Forest Operations Inspection Program and enforcement
- Independent Forest Audit Process and Protocol.

The applicants requested that more forestry instruments become subject to Part II of the *EBR* - the Environmental Registry notice and comment provisions, including:

- Sustainable Forest Licences and all other licences under the *CFSA*
- Amendments to any licences issued under the *CFSA*
- Forest management plans and their amendments
- Annual work schedules and their amendments.

The applicants also asked that all regulations, guidelines and policies made under the *CFSA* be posted on the Registry for public comment.

The applicants also requested MNR review the need for a number of new policies. The applicants' preferred approach was a review of alternatives to the compliance self-inspection regime established for forest licence holders from April 1998 onwards. The applicants suggested that MNR either re-establish itself as the primary agency responsible for carrying out compliance inspections, or that the ministry establish a profession of independent forest operations inspectors. In the alternative, the applicants requested review of the need for a number of new policies, including:

- The strengthening of MNR's field inspection capacity for forest operations
- The establishment of mandatory training and certification requirements for non-MNR employees carrying out inspections of forest management operations
- Modification of the ministry's reporting practices to clearly distinguish the data on instances of non-compliance identified through primary or spot-check inspections by MNR staff and data based on follow-up of reports of non-compliance by licence holders
- More timely public reporting of forest management activities through annual reports on forest management and other documents
- Accelerating efforts to clarify and consolidate its prescribed "rules" with respect to forest management to minimize the level of discretion available in their interpretation by licence holders.

The ECO forwarded the application to MNR, but also sent it to MOE because of the request for review of the instrument classification regulation under the *EBR*, (O.Reg. 681/94), a regulation that is technically under the control of MOE. MOE returned the application to the ECO since MNR is responsible for classifying these instruments. MOE did address many of the applicants' concerns in the Declaration Order Renewing the Class Environmental Assessment for Approval for Forest Management on Crown Lands in Ontario (MNR-71). MOE's response to the application is reviewed in the Supplement on pages 211-213.

Ministry Response

MNR decided that a review was not warranted, and instead suggested that the Pembina report and its recommendations would be considered as input for future reviews. In June 2003 MNR provided an 18-page response to the applicants, responding to most of the issues raised.

The ministry provided several reasons for its decision not to carry out an *EBR* review:

- The compliance program is consistent with the ministry's SEV
- The compliance monitoring program does not pose harm to the environment
- MNR found no evidence to support the allegations
- The program has been reviewed and actions are already being taken to address many issues raised in the application
- Several additional reviews are ongoing or upcoming which may address other issues raised
- A review as requested would require substantial human and fiscal resources
- Documents in question were posted on the Environmental Registry and are at or near the 5-year window of *EBR* review exemption.

The following is a summary of the key issues discussed by the ministry:

Understanding and Legal Status of the Self-Compliance System

The ministry argued that there is a great deal of misunderstanding of the terminology used and principles of self-monitoring. MNR did not transfer any responsibility from its mandate to the forest industry, such as determining the significance of contraventions. MNR insists that the forest industry merely provides information to the ministry and the ministry investigates non-compliance and carries out enforcement.

Other Reviews
MNR stated that the Forest Compliance Program has been the subject of two comprehensive internal reviews (1999, 2002), a provincial audit (2000), reviews by the Standing Committee on Public Accounts (2000 and 2003) and several *EBR* investigation requests. Further, several other periodic or special reviews are ongoing or coming up:

- MNR's first internal program review in 1999 found the program was functioning "reasonably well" and that relatively minor adjustments were necessary.

- The 2000 Provincial Auditor's report identified specific areas for improvement in compliance and enforcement. As follow-up to the Auditor's report, the Standing Committee on Public Accounts elaborated further on compliance program adjustments. The resulting MNR action plans included some immediate program changes and direction for field delivery and deferred some of these matters to the pending second MNR compliance program review.

- A second comprehensive internal review of forest compliance and enforcement was carried out in 2001/2002. The final report was submitted to the Provincial Auditor in 2002/2003.

  The findings confirmed that some previous observations remained unresolved but concluded that the program foundation was still sound. An action plan for implementation is currently being developed by the Forest Compliance Leadership Team. A number of issues identified in the 2002 review are repeated in the Pembina Report. The MNR action plan will address issues such as inspection process and reporting timelines; inspection report duplication and separation of MNR and industry reported non-compliance; review of the Forest Compliance Handbook; and a review of Guideline for Forest Industry Compliance Planning.
- The review and revision of the Class EA for Timber Management included reviews of the inspection monitoring and independent audit programs. The new MOE Declaration Order includes retention of the requirement to maintain a monitoring-inspection-reporting program.

- Each forest management unit is audited every five years through the Independent Forest Audit (IFA) program. The reports are considered by MNR in changes to policy and program direction. IFA reports are tabled in the Ontario Legislature.

- Both the Forest Management Program and the Enforcement Program of MNR are currently undergoing government-required program evaluations in order to assess whether or not they are relevant, effective, efficient, affordable and sustainable. "These will be comprehensive reviews and could address issues identified by the applicants, either directly or indirectly." The Enforcement program evaluation is due in October 2003 and the Forest Management program evaluation in 2004.

MNR also referred to other "reviews," including past *EBR* investigations, routine processes such as the annual roll-up of inspection reports, and periodic reviews of forest management guides.

Industry Capacity

- Beginning with the 1998 program, independent auditors began to assess the self-compliance program delivered by an SFL. "Based on the MNR evaluation, no evidence was found to support the argument that SFL capacity is an issue warranting a review as suggested."
- MNR is satisfied that a 1997 pilot/case study, MNR spot checks and ongoing IFAs adequately assess the capacity of an SFL to undertake compliance functions. "Ongoing audits, training and other initiatives will continue to improve on this capability. A review of this matter is not deemed warranted."
- MNR said that although currently certification is only mandatory for ministry inspectors, it supports the Pembina Report proposal for mandatory certification of company inspectors and will consider what steps are appropriate to initiate this.

Ministry Capacity

- MNR could find no evidence to support the allegation that there are shortcomings in MNR's ability to enforce the *CFSA*. MNR acknowledges there have been "some delays in enforcement" identified through internal reviews, but the matter has been identified and targeted for correction.
- The applicants' suggestions that the ministry double its inspection capability and budget or opt for a cost recovery system are high level considerations that go beyond the task of this preliminary examination. The capacity to deliver the MNR compliance function can fall within the scope of the Forest Management Program Evaluation that is required to take place.

Performance

- In absolute terms, more inspections are taking place now than prior to 1998, and the forest sector has doubled its inspections from 1998 to 2001.
- For the most part, only a slight increase in non-compliance reporting has been noted, and these are in the minor category.
- No evidence has been found, either in Independent Forest Audits or MNR spot-checks or the Compliance Information System to support the allegation of industry under-reporting.

Public Oversight and Access

MNR said it did not support the request to review the instrument classification regulation, or the request to subject instruments or regulations, guidelines and policies to *EBR* registry notice and comment requirements.

MNR provided two main reasons: first, that the instruments and policies implement provisions and decisions made in other processes that have gone through public consultation; and secondly, that the volume and frequency of the issuance of the instruments, policies and their amendments would make it nearly impossible to meet the extra *EBR* notice and comment requirements. MNR said that SFLs are considered to be administrative. MNR said posting SFLs would duplicate existing consultation process, increase red tape, cause delays and increase costs.

MNR said that the Forest Compliance Handbook, which is "a technical document of policy and procedure," implements provisions from other instruments and forest policies which have already been approved through *EBR* and EA processes." MNR invoked s. 32 of the *EBR*, which provides an exception to the requirement to post instruments considered steps towards implementing undertakings approved under the *EAA*.

MNR stated that the volume of SFLs, Annual Work Schedules (AWSs), and changes to the Forest Compliance Handbook and supporting documents result in a relatively high volume of changes. "There is questionable value-added in subjecting a high volume of administrative instruments to public review."

Follow-up to the Application
The applicants wrote to MNR in July 2003 expressing their disappointment with the response. They said that the ministry had failed to respond to a number of the major issues raised in the application, such as the Pembina Institute's suggested alternatives to the self-reporting system and their concern about access to "source" materials under the new system. They said MNR failed to acknowledge the degree to which the ministry had transferred responsibility for identifying licensee non-compliance, and failed to address the issue of the differences in the performance of MNR vs. industry inspectors in the identification of non-compliance.

The ministry wrote back to the applicants in August 2003 describing some further steps it had taken, and a meeting was subsequently held to further discuss the applicants' concerns. The ministry said it would be hiring 11 new positions dedicated largely to compliance monitoring and inspection and another position to oversee training, compliance systems and data management. As part of the updating of the Forest Management Planning Manual, future forest management plans will contain the forest industry compliance plans, "facilitating compliance and enforcement with the *CFSA*." MNR also described a number of improvements as a result of the Ministry of the Environment Declaration Order, resulting from the Timber Class EA review. MNR said that training and certification will be mandatory and MNR's internet Web site will provide management unit annual reports of forest operations inspections by MNR and the forest industry, partitioned to clearly show industry and MNR observed non-compliance. The reports will be updated annually and maintained for five years.

The ECO wrote to MNR in February 2004 requesting some of the documents referred to in their letters, and the ministry provided most of them in March 2004, except for the Enforcement Program Evaluation, which was considered a Cabinet document.

ECO Comment
Although MNR decided not to carry out this *EBR* review, MNR acknowledged that many of the applicants' concerns were justified and agreed to make some significant changes. By the end of the last follow-up with the applicants, and with some of the measures imposed by MOE, MNR said it was hiring more inspectors, making inspector certification mandatory, improving its public reporting and fixing its computer systems. Most of the guidelines and policies the applicants asked to have reviewed are going to be revised, and some high level "Program" reviews may look at more substantive issues.

In denying this review, MNR made the valid point that the program had already been reviewed and that improvements are underway. Unfortunately, the ministry plans to undertake most of these future reviews behind closed doors. The ministry did not offer the internal reviews or action plan to the applicants or the ECO, upon completion. As well, MNR's internal reviews didn't have the mandate to examine some of the important questions posed in this application for review, although they were well done, given their limitations. Moreover, the results have not been provided to the applicants and the public, as would be the case if a review were conducted under the *EBR*.

None of the other reasons MNR provided for denying the review were persuasive.

- MNR said that the Act, its regulation and regulated manuals were all subject to *EBR* notice and comment provisions prior to enactment. In fact, of these eight documents, only the Forest Information Manual was posted on the Registry prior to enactment.

- MNR said that A Forest Compliance Strategy was posted on the Registry and received no negative comments. But in fact, the Canadian Environmental Law Association found the draft Strategy vague and inadequate, and was "greatly concerned about the cryptic reference to self-compliance."

- MNR said it did not transfer any statutory responsibility or compliance function responsibility from its mandate to the forest industry sector. But in 1996, the ministry described the legal implications of the shift as follows: "The proposed business plan requires adjustments to the Terms and Conditions contained in the EA Board decision….terms and conditions need to be modified to reflect a shift in operational responsibility for monitoring and compliance from MNR. For example, the decision places the operational responsibility for monitoring and compliance with MNR, whereas the intent of the new business plan is for a high level of self-compliance by the forest industry."

The environmental assessment terms and conditions were amended in 2003, to change the wording from "MNR shall monitor" and "the area inspection program…will be used by MNR" to "MNR shall ensure" that monitoring take place through a forest operations inspection program. Thus, while MNR is still required to maintain a monitoring-inspection-reporting program, much of the operational responsibility has been shifted to the industry.

Instrument Classification

The ECO was disappointed with MNR's response regarding the request to review its instrument classification regulation. MNR invoked exceptions in the *EBR* that do not apply. MNR also raised concerns about the volume and frequency of the issuance of instruments, perceived red tape, delays and increased costs. But the Environmental Registry was designed to allow for public consultation while minimizing delays and costs, and these concerns should not be used to avoid classifying instruments. MNR argued that Sustainable Forest Licences are administrative, but the ECO has some doubts, because they contain many terms and conditions not covered in the forest management planning process. MNR did not even mention the other licences issued under the *CFSA* such as forest resource licences. MNR's arguments that SFLs and Annual Work Schedules (AWSs) and their in-year amendments are already subject to public review, and that their volume is too high to post, are not persuasive. It is true that FMPs, FMP amendments, AWSs and AWS amendments fall under the s. 32 exception to posting on the Registry, because they are part of an undertaking already approved under the *EAA*. But as explained below, it is still necessary to classify these instruments.

The ECO told MNR in 1997 that it was classifying too few forestry instruments and misinterpreting the s. 32 exception in the *EBR* related to Environmental Assessment. Section 20 of the *EBR* sets out a clear, stepwise process to follow to classify instruments, and MNR did not follow those steps. As the ECO reported in its review of MNR's instrument classification regulation in the 2001/2002 annual report, every environmentally significant instrument should be classified under the *EBR* whether or not it might be excepted from posting on the Registry. This is important in order that the instruments are subject to the application for review and investigation procedures. The ECO supports the applicants' recommendation that MNR should review its instrument classification regulation under s. 20 of the *EBR*, to redress the failure to classify these instruments under the *CFSA*.

Posting Acts, Regulations and Policies
MNR did not provide persuasive arguments for refusing to post the regulations, policies and guidelines governing their forest compliance program on the Registry for public comment. For example, the Forest Compliance Handbook has never been posted on the Registry. The Guideline for Forest Industry Compliance, including the Forest Operations Inspection Program (FOIP) Policy and Procedure, was posted on the Registry in 1998 at our urging. MNR has never posted any revisions to the Handbook, Guideline or the FOIP policy and procedure. These documents are all going to be reviewed and revised again as an action item resulting from MNR's second internal review. The major amendments planned by MNR should be subject to public and stakeholder notice and comment on the Environmental Registry, perhaps in one consolidated "Forest Compliance Program" notice.

Was There Evidence of Problems?
MNR said in many places that the MNR evaluation could find no evidence to support the applicants' allegations. For example, the ministry said it could find no evidence to support the allegation that there are shortcomings in MNR's ability to enforce the CFSA or that the forest industry may under-report non-compliance. But MNR's second internal review described companies that had not taken on the inspection role as required, and 'sketchy' inspection reports that lacked rationale as to why or how compliance status was derived. One MNR District felt that spot checks and audits were decreasing unacceptably due to increased workload in other areas and the review concluded that capacity issues are not uncommon in most MNR district offices.

The ministry stated that no evidence has been found, either in the Independent Forest Audits, MNR spot-checks and audits, or the Compliance Information System database to support the allegation that the forest industry may not be reporting violations as required. In fact, several recent independent forest audits have reviewed compliance inspection reports in the CIS database, carried out field inspections and concluded that companies have not reported contraventions as required. Several independent audits have also commented on MNR's inadequate oversight and follow-up.

The compliance statistics from MNR's internal reports provide more detail than those available to the public and analysed by the Pembina Institute. MNR's public reports provide only the statistics for 'in compliance' and 'not in compliance.' They don't report the third column from inspection reports: 'in compliance with comments,' which are "infractions of a minor nature, where the intent of the legislation, etc. is maintained, but there are minor variances, due to operating conditions and/or operational practices." The public annual reports on compliance for 2000/2001 show that 95 per cent of industry inspections were reported "in compliance" and only 5 per cent "not in compliance." By generating provincial level reports from individual inspection reports, the internal reviewers discovered that 21 per cent of all forest industry inspections and 28 per cent of all MNR inspections in 2000/2001 were recorded as "in-compliance with comments." MNR's second internal review found that a continued problem was a lack of ability by both MNR and industry inspectors to differentiate between the three categories of compliance. "This would indicate a high proportion of operations where improvement is required or perhaps where clearer, more exact, determination of compliance is necessary." MNR has begun to address this in the action items coming out of the latest internal review - one item is to provide further guidance to MNR and forest industry inspectors on consistently assessing field compliance, e.g., clarifying the three compliance status columns and what constitutes minor, moderate and major non-compliant situations.

Are There Problems With Enforcement?

MNR's December 2002 internal report found the industry perceives the application of remedies and enforcement as arbitrary, inconsistent and unfair. The review also found continuing problems resulting in penalties being withdrawn or changed; record-keeping and tracking improvements were behind schedule; and extreme pressure on staff resources. "Concern was expressed by both MNR and the forest industry that consistency in application of remedy and enforcement action needs to be assured, especially for administrative penalties. In order to do so, ministry field offices need access to information from other offices across the province and clearer policy direction." It recommended many action items, including a review of the financial support and administration which is being provided to administer enforcement of the *CFSA*.

Do Independent Forest Audits Evaluate Compliance Capacity?

The evidence suggests that Independent Forest Audits have not always reported on compliance capacity. In response to the applicants' request to amend the IFAPP to require audit teams to assess the capacity of SFL holders to carry out compliance activities, MNR said that "beginning with the 1998 program, auditors began to assess the self-compliance program delivered by an SFL." But the ECO reviewed a sample of independent audits conducted in 2000 and 2001 and found that some did report on compliance monitoring and some did not. As the applicants stated, the 2001 IFAPP does not specifically require the teams to review this. It does appear that the 2003 IFAPP includes several criteria reviewing compliance plans and compliance inspections, although it doesn't specifically require audit teams to write up compliance monitoring or the inspections process in the audit report. Given that MNR relies quite heavily on the Independent Forest Audits as a safeguard in its forest compliance program, it would be important to ensure that all audits review and report on compliance capacity.

Is There Evidence of Increased Non-Compliance?

The available data suggest that non-compliance increased over the last half of the 1990s.

Using MNR statistics, the applicants had stated that from 1995/1996 to 1999/2000 reported non-compliance rose in access activities from less than 10 per cent to nearly 30 per cent; in harvest from 15 per cent to 25 per cent; and renewal activities from less than 10 per cent to over 20 per cent. They also noted that the proportion of non-compliance considered "significant" had risen. MNR responded that "*for the most part*, only a slight increase in non-compliance reporting has been noted. These incidents are in the minor category and are attributable largely to wood utilization practices." MNR did not provide any updated statistics, however, MNR's own State of the Forest Report 2001 concluded that overall compliance decreased from 87 per cent in 1995/1996 to 75 per cent in 1999/2000... "the declining trend in overall compliance raises some concerns."

Need for Clearer Operating Standards

MNR's internal compliance program review found that there was a need for clearer operating standards. "A consistent message was heard in every location visited. The area requiring immediate attention in the form of operating standards is 'site damage,' i.e. rutting." The Forest Management Guidelines for the Protection of the Physical Environment contain only 'best practices' and fail to provide adequate direction for operators or compliance personnel. "The absence of standards in this area has created a wide range of compliance and enforcement issues." Many IFAs prepared recently have highlighted rutting and site damage. One of the action items arising from MNR's review is to develop standards for rutting and site damage. The ECO notes that MNR made a similar commitment in 1999 as a result of an *EBR* investigation, to review and strengthen its guidance for protection of fish habitat and streams, but the revised guides are still not completed. MNR must get these new standards developed quickly, with public consultation, and ensure they are implemented through a more enforceable mechanism than the 1997 guidelines.

Significant Improvements Are Underway

Although this *EBR* application was returned by MOE, the ministry did address some of the applicants' concerns about the forest operations inspections program under the Environmental Assessment process. In fact, MOE put in place several very significant, stringent regulatory requirements as conditions of the Forest Management Class EA.

MNR and MOE have taken a number of positive steps in the past year. Some of the most concrete and meaningful changes include:

- MNR says it will hire more inspectors and a coordinator
- Compliance plans will be part of forest management plans and annual work schedules
- Industry inspectors must be certified
- Annual reports summarizing inspections for each management unit will be on the internet
- Computer systems are being fixed to improve reporting and tracking problems.

MNR provided the action plan from its second internal review to the ECO. It includes specific action items to:

- Clarify rules and provide guidance to MNR and industry inspectors on how to determine compliance status and significance
- Require inspection reports to provide a rationale of how the compliance status was determined

- Integrate the SFL compliance plans into the forest management planning process by including a requirement in the revised Forest Management Planning Manual
- Ensure risk assessment is used to prioritize inspections, spot-checks and audits
- Revise enforcement rules to clarify penalties and ensure "proper tone and direction"
- Clarify frequency of reporting and report submission and advise that failing to comply with inspection and reporting standards is a violation
- Improve computer systems to separate repeat inspections of a singular site, separate industry reported non-compliance and MNR-reported non-compliance on the same site; incorporate a tracking function for remedial action follow-up from inspection reports; track repeat offenders
- Establish reasonable standards for site damage and review the guidelines for snag tree management to standardize the requirements.

The Pembina application probably contributed to MNR and MOE's decisions to move on some of these improvements.

The ECO suggests that MNR take the following additional steps to improve transparency of the forestry compliance program. Some of them are relatively easy, although they may require amendments to regulations and guidelines, or posting on the Environmental Registry:

- All public reports and analysis of forest operations inspections reports should reveal the reports of "In Compliance With Comments" as long as that column is in use.
- MNR's proposed revisions to the Forest Compliance Handbook, Guideline for Forest Industry Compliance Planning, Forest Operations Inspection Program Policy and Procedure and other related policies should be posted on the Environmental Registry for public comment, perhaps as one consolidated notice of proposed improvements to the Forest Compliance Program.
- MNR should revise the IFAPP to require evaluation and reporting on the self-inspection and reporting performance and capacity of SFL holder, and as reported in the unposted decisions section of the Supplement on pages 8-9, environmentally significant changes to the IFAPP should be posted on the Registry. As well, Independent Forest Audits should be released more quickly and should be easily accessible to the public.
- MNR should develop the new standards for rutting and site damage quickly, with the Provincial Forest Technical Committee and public consultation and finalize the revised guidance for protection of fish habitat and streams.
- MNR should review the instrument classification regulation under s. 20 of the *EBR* with regard to re-examining all potential instruments under the *CFSA*.

MNR needs to continue to implement improvements to this important compliance program and must remain vigilant about regularly reviewing key facets of the program such as self – compliance. Ontario's forest compliance system has to be credible to demonstrate to the public that forest management on Crown land is sustainable.

Review of Application R2003005:
Review of the Managed Forest Tax Incentive Program
(Review Undertaken by MNR)

Background/Summary of Issues

In fall 2003, the ECO received an application for review of the Managed Forest Tax Incentive Program (MFTIP) from persons representing private foresters in southern Ontario. MFTIP was created to ensure that forests which are actively managed by their landowners, and which are more than 4 hectares (10 acres) in size would be assessed similar to farm land and taxed at the rate of 25 per cent of the municipal tax rate for residential properties. This tax treatment encourages landowners to be good managers, or stewards, of private forest land and is needed to reduce the incentive to remove trees from forest lands to achieve the lower tax assessment as agricultural land.

The application outlined the concerns about the MFTIP program from managed forest property owners. In particular, it focused on the issue of how properties were being assessed for taxation purposes – an issue which began to intensify between late 2002 and early 2003. The applicants alleged that, at that time, the Municipal Property Assessment Corporation (MPAC), a municipally funded, not-for-profit corporation which assesses the value of property in Ontario for taxation purposes, began changing its methods of assessing the value of managed forest properties. MPAC states it made certain changes in 2003 at the direction of the Ministry of Finance (MOF) – this ministry has authority over the *Assessment Act* which is used by MPAC for property tax assessment. According to the applicants, the changes to MPAC's property value assessment methodologies mean that many managed forest owners are being required to pay substantial increases in property taxes which will result in the demise of the MFTIP program. The applicants speculated that if managed forest property owners' tax assessment issues are not resolved then many forested properties in Southern Ontario could undergo clearing and land use transformation.

Ministry Response

MNR stated in December 2003, that it would undertake the review and that it would take 90 days to complete. MNR first anticipated a response by late April 2004. Later, MNR wrote to ECO on two occasions explaining that more time was required to prepare a response and extending the expected reporting date to late May, then late June 2004.

ECO Comment

ECO will complete its review of this application in the 2004/2005 reporting year.

Review of Application R2003008:
Rehabilitation of Ontario's Pits and Quarries
(Review Undertaken by MNR)

Background/Summary of Issues

In November 2003, the applicants submitted an application for review of the *Aggregate Resources Act* (*ARA*) related to the rehabilitation of pits and quarries. The applicants submitted evidence alleging that less than half of the land disturbed by aggregate operations in the past decade have been rehabilitated, despite the clear intent of the *ARA* that progressive rehabilitation occur on all sites. They requested that the *ARA* be revised and enforced to provide rehabilitation in an open and accountable manner.

They also asked for a review of the system of managing the Aggregate Resources Trust, a fund for the rehabilitation of abandoned pits and quarries. The ministry gave the responsibility for the administration of the fund to an industry group in 1997. The applicants said that the Management of Abandoned Aggregate Properties program should be more transparent. The applicants also requested the *ARA* be amended to re-institute an effective system of rewards and punishments to guarantee that pits and quarries are rehabilitated.

Ministry Response
MNR informed the applicants in January 2004 that it was carrying out a review of the matters raised in the application. MNR's target date for completion is July 2004.

ECO Comment
The ECO will review the outcome of this review when it is completed.

Review of Application R2003011:
Review of the *Conservation Authorities Act* and Regulation 170
(Decision Pending by MNR)

Background/Summary of Issues
In February 2004, the applicants submitted an application for review to MNR of the *Conservation Authorities Act*, specifically ss. 20 and 28. The applicants also requested that the ministry review Regulation 170, specifically ss. 4 and 5. The applicants are requesting that MNR consider the need to amend the Act and its regulation in order to have clearly established standards, principles, and criteria to regulate the filling of floodplains.

Ministry Response
MNR is expected to reach a decision on whether or not to conduct this review by April 10, 2004.

ECO Comment
The ECO will review the ministry's decision and handling of this application in the 2004/2005 reporting period.

Review of Application R2003012:
Mineral Aggregate Availability in the Provincial Policy Statement
(Review Returned by MNR)

Background/Summary of Issues
In February 2004, the applicants filed an application for review with the Ministry of Natural Resources requesting that it consider changing s. 2.2.3.1 of the Provincial Policy Statement that

states, "As much of the mineral aggregate resources as is realistically possible will be made available to supply mineral resource needs, as close to markets as possible."

Ministry Response

MNR returned the application to the ECO, stating that any reviews of the Provincial Policy Statement are the responsibility of the Ministry of Municipal Affairs and Housing.

ECO Comment

The ECO will review the ministry's decision and handling of this application in the 2004/2005 reporting period.

SECTION 6

ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION IN 2003/2004

SECTION 6: ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

NOTE: An allegation contained in an application may or may not have been proven to be an offence under the laws of Ontario or Canada.

MINISTRY OF THE ENVIRONMENT

Review of Application I99008:
Alleged *OWRA*, *EPA* and *EAA* Contraventions by Snow Valley Ski Resort through Road and Sewage System Construction
(Investigation Undertaken by MOE)

In March 1999, the ECO received an application for investigation from two Minesing residents concerned with the road construction and sewage disposal system installation at the nearby Snow Valley Ski Resort, north of Barrie. The applicants alleged that the Snow Valley Ski Resort and its owner violated the *Environmental Assessment Act* (*EAA*), the *Environmental Protection Act* (*EPA*) and the *Ontario Water Resources Act* (*OWRA*). MOE undertook the investigation. For greater detail, see page 231 of the Supplement to our 2002/2003 annual report.

In July 2002, ECO staff were advised that the investigation had been completed and that charges were laid on February 20, 2002. A trial was held in late 2002 and charges were dismissed but MOE appealed this verdict. The ECO contacted MOE in May 2004. At that time, the charges were still under appeal. The matter had been adjourned. The ECO will provide an update on this proceeding when this matter is concluded.

Review of Application I2000005:
Alleged *EAA* Contravention by the Ontario Realty Corporation
(Investigation Undertaken by MOE)

Background/Summary of Issues
This application, submitted January 1, 2001, alleged that the Ontario Realty Corporation (ORC) contravened the *Environmental Assessment Act* by failing to comply with the requirements of the Class Environmental Assessment for ORC Realty Activities (Class EA). ORC is the agency responsible for lands and property owned by the provincial government. The Class EA sets out requirements for environmental study, documentation and public consultation for a number of ORC activities, including land sales. It is noteworthy that the Class EA was recently revised and the Ministry of the Environment (MOE) approved a new Class EA on April 28, 2004. The investigation was carried out under the original Class EA approved in 1992.

The applicants said that ORC had sold or was proposing to sell properties within the 4,000 hectare "North Pickering-Markham Agricultural Land Assembly" for development without the proper environmental assessments as required by the Class EA. The applicants also stated that ORC had "steadfastly refused" to consult with them in any deliberations concerning the possible sale of lands affecting the Rouge Valley ecosystem. The applicants listed five specific properties of concern: four properties in Markham and one property on the Oak Ridges Moraine. In the following text they are described as Areas 1, 2, 3, 4 and 5.

The 1992 Class EA sets out different levels of EA study, or "categories" for different types of activities. Category A undertakings are routine activities considered "pre-approved." Category B undertakings require consultation with directly affected parties, a site analysis, and filing of a consultation and documentation record, which must then be available to the public. Category C undertakings need more scrutiny; they require an environmental study report and several stages of public consultation. Category D undertakings are major projects requiring more thorough individual environmental assessments. The Class EA places land sales in Category B, with the exception of sale or disposal of property containing or affecting an Environmentally Significant Area (ESA), to a non-conservation body, which is listed as Category C. The applicants submitted the ORC Consultation and Documentation Record for the North Pickering-Markham Agricultural Land Assembly as evidence that the land sales it covered should have been carried out as a Category C or D rather than as a Category B undertaking.

Ministry Response

MOE carried out an *EBR* investigation and delivered the results in three stages, in letters dated May 31, 2002, September 27, 2002 and January 13, 2003. MOE concluded that "none of the available information had shown that the Ontario Realty Corporation conducted the wrong category of assessment for any of the properties mentioned in the application." For several properties that had already been sold, MOE was unable to determine whether the correct category of assessment was conducted because ORC was unable to produce the necessary records. MOE pointed out that, even if the wrong environmental planning process was followed, the limitation period for prosecutions for this offence had expired because the sales took place several years ago. Under the *Provincial Offences Act*, charges for an offence under the *EAA* must be laid within six months after the date upon which the offence was or is alleged to have been committed.

As ORC was required by the Class EA to maintain records on an ongoing basis, and thus the expiry of a limitation period does not apply, MOE forwarded that matter to its Investigations and Enforcement Branch for further investigation and possible prosecution. Upon further investigation the ministry concluded that the record-keeping requirements related to the properties in question had been complied with and no further action will be taken. The ministry did say however that options were being considered to address the record-keeping problems identified during the investigation, including improved record-keeping and compliance monitoring provisions in ORC's new Class EA for realty activities.

MOE said it could only conduct a full analysis of the consultation and documentation records for the lands in Area 1 and Area 5. A similar analysis could not be conducted for Areas 2 and 3 as ORC said no lands were sold within those areas. The record for the lands sold in Area 4 could not be analysed as ORC failed to produce records relating to the lands that had been sold.

For Area 1, MOE carried out a review of the Consultation and Documentation Record for the North Pickering-Markham Agricultural Land Assembly (the Land Assembly Record) to determine whether it had been prepared in accordance with the requirements set out in the Class

EA and whether the proper environmental planning category had been applied. MOE concluded that ORC had correctly determined that the sale of the Land Assembly was a Category B undertaking and completed a record as required by the Class EA. MOE said that once ESAs were identified on the lands ORC made a commitment to ensure that they were partitioned and transferred to the Toronto Region Conservation Authority to keep them in public ownership.

With regard to Area 5, the Reesor Road property sold to the Catholic Cemeteries Archdiocese of Toronto (CCAT), MOE concluded that the proposed sale had properly been categorized as a Category B undertaking because there were no environmentally significant areas on the property.

ECO Comment

The ECO reported on this investigation in the Supplement to our 2002/2003 annual report. We noted that the investigation highlighted the inadequacy of the statute of limitations for prosecutions under the *Provincial Offences Act*, because the limitation period for prosecutions under the *EAA* is a mere 6 months. This makes it very difficult to pursue applications for investigation under the *EBR*, especially when the ministry takes two years to complete an investigation, as it did in this case. Moreover, the combination of the six-month limitation period in the *EAA* and long MOE investigations can deprive applicants of their rights to launch private prosecutions, should MOE decide not to take action. The applicants could only proceed with a private prosecution on one of the many individual land sales due to the short statute of limitations. MOE should consider amending the *EAA* to provide a two-year statute of limitations.

We also described a private prosecution launched against ORC during the *EBR* investigation related to one of the properties in question. We said we would monitor the court case and report the outcome in the next annual report. The trial is discussed further below under Area 5 – Reesor Road property.

The ECO concluded in our analysis of the application for investigation that MOE did not carry out an adequate investigation of ORC's compliance with its Class EA. The ECO was encouraged that MOE was finally undertaking an investigation into ORC's compliance with its Class EA, given our findings regarding land sales in the 1998 and 1999/2000 annual reports, but was very disappointed with MOE's response. It appears to the ECO that MOE condoned ORC non-compliance where it was encountered and failed to review other matters of compliance that should have been investigated. It was acceptable for MOE to provide the results to the applicants in stages as different aspects of the investigation were concluded, but the ministry should have been clearer and more precise in communicating its findings. Finally, MOE made incorrect and misleading statements to the applicants in its defence of ORC's actions.

In summary, as we reported in 1998 and 1999/2000, the ECO concludes Area 1, the North Pickering-Markham Land Assembly should have been categorized as a Category C undertaking, not a Category B. ORC did not even meet the minimum requirements for Category B environmental study and public consultation. The records were too sparse for MOE or the ECO to make any findings on how ORC handled its Class EA obligations in relation to Areas 2, 3 and 4, which is a significant finding in itself. For area 5, the Reesor Road property, the ECO determined that MOE did not adequately investigate ORC's compliance with Category B requirements, and that ORC did not comply with the Category B requirements of the Class EA.

Detailed Analysis of Areas 1 and 5

The North Pickering-Markham Agricultural Land Assembly
The ECO does not agree with MOE's conclusion that ORC conducted the proper category of assessment for the Land Assembly. ORC identified many ESAs within the over 4,000 hectares it was selling to both conservation and non-conservation bodies, which should require a "C" process with environmental studies and several stages of public consultation. But ORC decided to carry out the sales program as a "B" project with the following measures noted in the Land Assembly Record:

1. ORC would conduct a Category "C" level project for any individual properties with ESAs that it decided to sell to non-conservation bodies, or
2. ORC would ensure the municipality had equivalent requirements in their official plan in the event future private purchasers were to propose land use change
3. ORC will partition the ESAs and sell them to the conservation authority

The first is "piece-mealing" and expressly forbidden by the Class EA – all components of an undertaking have to be conducted at the most stringent possible category of assessment, in this case Category C. There are no provisions in the Class EA to allow the second option. As for the third, there was no guarantee that all ESAs identified in 1996 would be sold to the conservation authority, and indeed they weren't. By conducting this undertaking as a category B, no environmental inventory was taken of the Land Assembly as a whole beyond whatever studies had already been done (mostly on the valley lands). Also, the negotiations about which lands would be protected were carried out by a few individuals without broader public notice or consultation. This is in contrast to ORC's more recent proposed sale of the Oakville Land Assembly, which was conducted as a Category C project, and resulted in extensive study of wetlands, wildlife corridors, and provincial and regional natural heritage features. Although the final outcome is not yet decided, use of a Category C process in Oakville resulted in more land being identified as environmentally significant, more consideration of alternatives and more public consultation than the Category B process used for the North Pickering-Markham Agricultural Land Assembly.

Even if it had been acceptable for ORC to carry out a Category B process for the Land Assembly, the ECO found that ORC failed to meet the requirements for a Category B project. MOE commented on only one deficiency: the Class EA requires that all Category B projects undergo a six-point analysis. The Land Assembly Record stated that there were significant heritage resources, ESAs and distinctive environmental features on the lands for sale, but then ORC did not describe them as required. MOE said that "the Class EA states that distinctive environmental features must be investigated and documented, where applicable. As the Class EA is not clear on when a description would/would not be applicable, the MOE is considering options to address this matter in ORC's proposed new Class EA."

This was a very weak response from MOE. The Class EA makes it clear that undertaking the six-point analysis is mandatory and that the description and conclusions of the six-point analysis, including any problems identified and planned mitigation measures must be provided to directly affected parties. ORC also failed to analyse the effects of the sale on the prime agricultural lands identified, and failed to investigate site contamination, servicing capacity or well water quality.

MOE did not respond to the allegation in the application that the public was not consulted. ORC's Land Assembly Record mentions letters and meetings with other government agencies, the Rouge Park Alliance and one meeting with 6 tenants. It does not provide any indication that the public, environmental groups or First Nations were provided with public notice and given an opportunity to provide comment as required by the Class EA.

The ECO believes that MOE should have concluded that there was strong evidence that ORC was not complying with the Class EA in several aspects on the sale of the Agricultural Land Assembly. The ECO first informed MOE that ORC was contravening the Class EA on land sales taking place within the Agricultural Land Assembly in 1998, when MOE could have taken enforcement action.

Area 5 - The Reesor Road Property

The ministry did not provide an *EBR* investigation summary for Area 5, the Reesor Road property, but simply sent a copy of its response to the applicants' bump-up request and said this concluded the *EBR* investigation as well. The letter was brief and not as informative as the *EBR* investigation summary that MOE usually sends to applicants, such as the summary MOE sent regarding its investigation into the other properties. For example, MOE did not provide the applicants with a point-by-point review of the Reesor Road Consultation and Documentation Record (the Reesor Road Record), as it did with the Land Assembly Consultation and Documentation Record.

The ECO has commented before in such cases that MOE should not equate turning down a bump-up request with determining that a proponent is in compliance with a Class EA and the *EAA*. MOE's response to the applicants stating there was no need to bump-up the project to a Category C project did not persuade the ECO that ORC was in compliance with the Class EA on this land sale. The ECO carried out additional research on this property, carrying out interviews, examining MOE's public files and documents filed with the court.

Did ORC Comply with Category B Requirements?

The ECO accepts MOE's conclusion that ORC was in compliance in categorizing the sale as a Category B project. However, the ECO does not believe that MOE properly assessed ORC's compliance with the requirements for carrying out a Category B project for Area 5, nor that ORC met those requirements. MOE did not carry out an adequate investigation, and did not provide an adequate investigation summary about its investigation on this property to the applicants. MOE's only statement was that ORC completed the Reesor Road Consultation and Documentation Record as required. MOE did not comment on the adequacy of the Reesor Road Record, even though it provided that kind of analysis of the Land Assembly Consultation and Documentation Record.

According to the Class EA, the Reesor Road Record should show the results of consultation with directly affected agencies and members of the public; set out the potential impacts identified through study of the project; include discussion of the issues and concerns raised and how they were addressed and resolved; and include a list of the parties contacted and any meetings which took place. The ECO evaluated ORC's Consultation and Documentation Record for the Reesor Road land sale and found it inadequate in many respects.

MOE also misled the applicants in its correspondence related to the Reesor Road land sale. The applicants were concerned that the land sale would violate the provincial government's commitment to create a 600 metre corridor along the Little Rouge Creek in the Rouge Park North. MOE responded that "the provincial commitment to maintain a 600 metre buffer around Little Rouge Creek has been maintained," implying that the applicants' concerns were groundless. However, within MOE's own public file on the bump-up, there was evidence that the land sale did indeed encroach on the corridor, but negotiations between ORC and the Rouge Park Alliance ensued that provided for compensating lands to be added to the corridor in other areas.

The tone of the minister's bump-up denial letter suggested that MOE believed that all the applicants' concerns were groundless. MOE rebutted every concern emphatically – after saying that the 600 metre buffer was maintained and there would be no effect on fish and water quality, the letter concluded that "there are no issues of environmental significance surrounding the sale of this land to CCAT." In fact, there were many issues of environmental significance, raised by agencies such as MNR, the conservation authority and the Rouge Park Alliance, not just the applicants. Those agencies raised many of the same concerns as the applicants. It would have been more appropriate to acknowledge the concerns, and describe the negotiations and mitigation measures that had been put in place to address the concerns, as intended by the environmental assessment process.

For example, with respect to fish and water quality, the Town of Markham had required CCAT to prepare studies of hydrogeology and mitigate the impact of the cemetery on local groundwater and surface water at the request of the Rouge Park Alliance. The Rouge Park Alliance raised concerns about habitat fragmentation for example, and they recommended that high fences or structures be avoided. There was also the significant compromise on the size of the Rouge Park corridor. If ORC had conducted a proper environmental assessment and consultation and documentation record, those concerns would have been documented, along with their resolutions. It is somewhat understandable that ORC's letter to MOE in response to its request for information about the bump-up request would defend its own position. But MOE's investigation should have been objective and independent and not just repeated ORC's statements.

Was Consultation Adequate?

The applicants stated that ORC had steadfastly refused to consult their group, the Save the Rouge Valley System Inc., in any deliberations concerning the possible sale of lands affecting the Rouge Valley ecosystem. In their letter to MOE regarding the bump-up request, ORC told MOE that "Since SRVSI is a partner in the Rouge Park Alliance, it is inappropriate for ORC to pursue consultations with SRVSI outside the framework of the Rouge Park Alliance." MOE accepted that argument from ORC. It is very disappointing that MOE would take this position limiting public consultation under the Class EA.

MOE accepted ORC's deficient Reesor Road Consultation and Documentation Record and the contents of its letter to MOE without questioning whether ORC did, in fact, provide notice and an opportunity to comment, to the public and directly affected parties. To be fair, MOE wasn't asked in the *EBR* application to investigate whether ORC provided notice of the land sale or consulted adequately with the general public or First Nations. However, the ECO believes that MOE should not have concluded that "[MOE's] review of the available information related to ORC's Reesor Road property land sale activities has revealed that ORC appropriately followed the approved planning process set out in the Class EA." In the large body of material reviewed by the ECO on this file, we found no evidence that ORC provided notice and an opportunity for the public, environmental groups or First Nations to comment on the land sale.

The Private Prosecution
The Reesor Road property was sold to the Catholic Cemeteries Archdiocese of Toronto (CCAT) on March 28, 2002, during the *EBR* investigation. MOE informed the applicants two months after the sale closed, that it had determined that ORC was in compliance with the *EAA*. In July 2002 David Sanford, representing the Huron Wendat First Nation, commenced a private prosecution in the Ontario Court of Justice alleging that ORC failed to conduct a proper environmental assessment before selling the property. He alleged ORC did not follow the mandatory procedures for completing a Category B land sale, failing to: describe the undertaking; prepare an analysis of the site and impacts; identify the public and directly affected parties including tenants/farmers, aboriginal people and environmental groups; conduct public consultation and document contacts and issue resolution. One of the *EBR* applicants assisted Mr. Sanford in the private prosecution.

In our 2002/2003 annual report the ECO said it would monitor the court case and report the outcome in the next annual report. We did not comment on MOE's conclusions regarding the investigation because we did not want to influence the court case. During the 2003/2004 reporting period, the ECO undertook further review of the ministry's handling of the investigation, including conducting interviews and reviewing the ministry's public EA file and documents filed during the court case. In January 2004 the Environmental Commissioner was compelled to testify at the trial. The Commissioner testified that it was his view that ORC was obliged by its Class EA to consult relevant aboriginal groups, that there was no indication that ORC had undertaken any consultation with aboriginal groups, and that he disagreed with MOE's conclusion on the *EBR* investigation that ORC was in compliance with its Class EA on this land sale.

ORC was asked to provide evidence that it had consulted with First Nations and the public at the trial, and could provide no persuasive evidence or documentation. Defence counsel for ORC argued on one hand that there was no requirement for ORC to consult (for example in its final argument the defence submitted that public consultation is not a legislated requirement under the Class EA and there were no directly affected people to consult with regarding the site). On the other hand, the defence also argued that ORC did meet the requirements to consult (for example in its final argument the defence submitted that ORC had taken reasonable care to comply with the requirements of the Class EA and had provided notice through various means).

On May 17, 2004 Justice of the Peace Sunny Ng found ORC guilty of an offence under the *Environmental Assessment Act* and fined the agency $7,500. The maximum fine for a first offence is $10,000. A written decision has not yet been released, but according to press reports, he stated that the requirement to consult was mandatory and ORC had made no attempt to consult despite its assertion to the contrary. He said ORC had a clear obligation to fully consult with aboriginal people and other involved parties on any land sale. He said there was no documented evidence that contact had been made with interested First Nations and ruled that the Ontario government had neglected its fiduciary responsibility to aboriginal people by not consulting with them before the sale.

This private prosecution is ground-breaking, and should serve as a wake-up call to environmental assessment proponents and MOE. Although the Class EA process is designed to be self-regulating, proponents must follow their approved processes and any terms and conditions. The ECO notes that MOE remains responsible for monitoring and enforcing compliance, and for responding to *EBR* investigations and other complaints. In this *EBR* investigation, MOE seemed to defend the proponent against allegations of non-compliance, rather than acting as a regulator. MOE did not follow up on ECO warnings about ORC non-compliance on this file for several years, and then, when pressed formally through an *EBR* investigation, determined ORC was in compliance. Now, through a private prosecution on the same land sale, the court has determined that MOE's judgement was wrong. This sends a powerful signal that must be heeded.

It is noteworthy that many applications for investigation under the *EBR* have involved alleged violations of Class EAs and concerns that they were not adequately monitored by MOE. Also, this was the second time in five years that an environmental group felt compelled to go to the courts to bring attention to MOE's inadequate enforcement of the *EAA*. In the other instance, the Algonquin Wildlands League and the Friends of Temagami sought judicial review in 1998 of timber and forest management plans on the grounds that the Ministry of Natural Resources (MNR) had approved the plans in violation of conditions imposed under the *EAA*. In that case the Ontario Divisional Court agreed with the applicants and found that MNR violated six terms and conditions of the Timber Class EA by approving three forest management plans without following the required planning process or developing the necessary background documents. The Ontario Court of Appeal upheld this decision. These applications for investigation, and court proceedings, reinforce the need for MOE to take its responsibility for monitoring Class EAs seriously. See also pages 52-59 for a further discussion of environmental assessment issues.

Review of Application I2002005:
Alleged *EPA* Contravention by an Asphalt Facility
(Investigation Undertaken by MOE)

Background/Summary of Issues

In July 2002, the applicants submitted an application alleging that a hot-mix asphalt plant operated in Horton Township, Renfrew County by the Miller Group Inc., was releasing dust and a tar-like odour, and creating excessive noise. The asphalt plant had been operated as a portable plant in the Jamieson Pit since 1971, and was moved to its current location in the pit in 1993.

The applicants alleged that the plant was in violation of sections 9 and 14 of the *Environmental Protection Act (EPA)* and Regulations 346 R.R.O. 1990 (pertaining to general air pollution) and Regulation 349 R.R.O. 1990 (pertaining to hot mix asphalt facilities) under the same Act. According to the applicants, the dust, odour and noise emitted from the plant was affecting neighbouring properties, including their own. The applicants claimed that the plant had impacts on vegetation in the area, gave some people headaches and generally "changes your living style". The applicants could not leave their windows open, hang their clothes on the line or simply sit, eat or barbecue outside because of the dust and smell. The applicants had previously expressed their concerns about the plant to the Ministry of the Environment's (MOE) Ottawa District Office on a number of occasions since 1998. The applicants expressed frustration at MOE's handling of their concerns from the late 1990s onwards.

In June 1999, MOE officials from the Ottawa District Office conducted an inspection of the plant after receiving several complaints over its emissions from neighbouring residents. The inspection report concluded that: "the plant seems to be operating in compliance with sections 3 and 4 of Regulation 349 but there are a number of areas where improvements could be made." Sections 3 and 4 of the regulation prohibit the off-site discharge of any visible emissions. The ministry required the owners of the plant to take a number of actions including, ensuring that the plant's equipment is in good repair and that all pollution control equipment is operating at optimal efficiency. MOE also required the owners to ensure that no unnecessary fugitive particulate emissions result from the operation of the equipment and to develop, maintain and document a comprehensive inspection and maintenance program for the operation and equipment.

In April 2001, MOE wrote to the Miller Group Inc., advising the owners that the plant must now be operated in accordance with a Certificate of Approval (C of A) for a permanent asphalt plant as required by Regulation 349. According to Regulation 349, a portable hot mix asphalt facility is only portable if it "remains at one location for less than one year". On July 11, 2001, MOE posted a proposal notice on the Environmental Registry for a section 9 *EPA* approval for air for the plant (IA01E1002). The notice indicated that the applicants had requested to modify their current approval from a portable plant to a permanent plant to comply with Regulation 349 and stated that the "plant equipment operations, and emissions control system has not been changed." The notice remained at the proposal stage at the time of the applicants' submission in July 2002.

In their application, the applicants wrote that MOE staff told them that the amended C of A was approved on April 25, 2002. In September 2002, the applicants informed the ECO that they had written MOE to obtain a copy of the C of A. However, MOE did not provide them a copy of the approval or information about it.

After forwarding the application to MOE, the ECO requested that the ministry consider assigning the investigation to staff from a district office other than the Ottawa District Office, as that office had been aware of the applicants' concerns and in communication with them since 1998 and the applicants had expressed frustration at MOE's handling of the situation.

Ministry Response
In September 2002, MOE informed the ECO that it was undertaking an investigation. The ministry expected to complete its investigation by November 5, 2002 and give notice to the applicants by December 5, 2002. In a letter to the applicants dated November 8, 2002, MOE indicated that the expected completion date for the investigation had been changed to April 4, 2003, with a reporting date of one month later. The ministry explained: "Based on the date of completion for the source testing and the need to undertake a detailed review of the source testing report the ministry requires additional time to fully analyze the information to determine compliance."

On April 28, 2003, MOE reported to the applicants on the nature and the outcome of the investigation. The ministry's decision summary indicated that it had investigated the Miller Group Inc. for alleged contraventions under sections 9 and 14 of the *EPA*. The investigation consisted of a review and compliance assessment of ministry legislation, regulations, authorizing documents and control documents that directly or indirectly related to dust and particulate matter emissions from the operation of the facility. The investigation involved staff from two MOE offices: the Ottawa District Office and the Standards Development Branch. Staff from the district office reviewed information contained in ministry files and conducted a site surveillance program "to collect information and to make observations during facility operation". Staff from the Standards Development Branch "reviewed and approved the source testing protocols and were on the site to verify that the source testing was done in accordance with established procedures. The source testing was a requirement of the current certificate of approval for the facility."

The decision summary reported that the facility was found to be in non-compliance with two legal requirements. First, the company was found to be in non-compliance with one condition of its existing C of A for air. The company had failed to prepare a manual outlining the operating and maintenance program for the plant as required. MOE charged the company for this contravention, issuing it a ticket (for $380.00) under the *Provincial Offences Act*.

Second, the company was found to be in non-compliance with the air emission standards and contaminant emission rates for suspended particulate matter under Regulation 346 and Regulation 349. To address this, MOE issued a Provincial Officer Order (P.O.O.) which required that the company "retain a qualified consultant to prepare an abatement plan and implementation schedule for modifications to the plant to ensure compliance with Ministry regulations." In the decision summary, MOE indicated that it would evaluate the effectiveness of the proposed modifications to ensure that future air emissions would be in line with ministry requirements. MOE noted that the changes may require modification to the plant's C of A and that any proposed modification to the C of A would be posted on the Environmental Registry, allowing the applicants to provide input.

The decision summary also stated that the "investigation findings did not support the allegations of off site property or vegetation damage that would result in a contravention of Section 14 of the *Environmental Protection Act*."

On July 17, 2003, the ministry posted notice of proposed amendments to the Miller Group Inc.'s C of A on the Environmental Registry (IA03E1030). The public was invited to provide input on a proposal to amend the company's C of A to replace the existing venturi scrubber with a fabric filter baghouse in order to improve the collection of particulate matter. The notice indicated that the application also sought "approval for modifications to pollution control equipment, and the addition of one (1) hot oil heater."

Other Information
In early February 2004, the applicants both phoned and wrote to the ECO. They indicated that, until December 1, 2003 when the plant shut down for the season, there had been no change in the levels of emissions from the plant. At that time, the July 2003 Registry notice (IA03E1030) as well as the July 2001 Registry notice (IA01E1002) for the Cs of A for the Miller Group Inc. remained proposal notices on the Registry (i.e., the notices had not been updated to reflect any decisions made). ECO staff subsequently contacted MOE's Environmental Assessment and Approvals Branch (EAAB) to inquire into the status of the approval process triggered by the investigation under the *EBR* (as described in IA03E1030). The ECO also asked the ministry about the July 2001 proposal notice (IA01E1002).

In late February 2004, MOE updated its July 2001 proposal notice indicating that a decision to grant the plant permanent status had been made. The notice summarized nine concerns of one commenter relating to dust, operating hours, noise and zoning and described, in general terms, how the concerns of the one commenter were taken into consideration. However, the notice failed to provide effective and decision dates and did not include the name of a contact person. The notice also used language that was inappropriate (i.e., it repeatedly described the commenter as "complaining" about various issues) and when referring to the commenter, used identifiers which were too specific.

In March 2004, MOE's EAAB provided a detailed written response to the ECO. The letter confirmed that MOE had made a decision on the approval described in the July 2001 proposal notice. The decision had resulted in the issuance of a C of A for air on April 25, 2002. "However a notice of the decision was not posted at the time the certificate was issued. This was recently remedied when the decision was posted on the *EBR* on February 24, 2004." During the C of A review, noise, odour and total suspended particulate (TSP) emissions were assessed. As a result of the review, MOE required the Miller Group Inc. to "modify their proposal to include an acoustic berm/barrier in order to reduce the noise impact from the facility to meet ministry requirements." MOE determined that the impact of odour emissions would be "below a level expected to cause odour concerns." In addition, the C of A included a requirement for follow-up source testing to confirm the performance of the pollution control equipment. This information contradicted the Registry notice which stated that the "plant equipment operations, and emissions control system has not been changed."

In the same letter, MOE also indicated that it had completed the technical review of the proposed C of A amendments resulting from the *EBR* investigation, "discussed the findings with the Ottawa District Office and is preparing a Certificate of Approval (Air)." The response indicated that this review had focused on TSP emissions and that the amendments would not have any effect on noise and odour emissions. It also stated that the proposed new control equipment would bring the company into compliance in terms of the requirements of Ontario Regulation 346 for TSP. MOE did not indicate when it expected the plant to be brought into compliance for TSP, but indicated that "a requirement to conduct source testing within six months of the date of the issuance to confirm compliance will be included in the Certificate of Approval (Air)."

In April 2004, MOE updated the July 2003 Registry notice to indicate that a decision had been made to issue the Miller Group Inc. the new C of A. The company was granted approval to replace its existing venturi scrubber with a fabric filter baghouse and to make changes to other pollution control equipment as proposed. The notice summarized the one set of comments received by the ministry. However, as with the other C of A Registry notice, the ministry failed to indicate effective and decision dates and to include the name of a contact person. The notice also used language that was inappropriate, repeatedly describing the commenters as "complaining" about various issues.

The ECO was informed by MOE's Environmental Bill of Rights Office (EBRO) in late April 2004 that the ministry recognized the problematic nature of the two Registry notices. In mid June 2004, MOE revised the notices to include the use of appropriate language, greater detail and a factual correction.

ECO Comment

The ECO is encouraged that MOE undertook the investigation and that it has taken steps to bring the facility into compliance with Ontario's air standards. However, it does not appear that the investigation addressed all of the applicants' concerns. The decision summary indicates that the investigation covered particulate matter issues, but does not comment on whether the applicants' concerns about odour were considered. While the decision summary indicates that the investigation involved a site surveillance program, it does not specifically mention whether fugitive dust was studied. Road dust and inadequate aggregate handling and storage practices can be the source of significant particulate matter emissions from asphalt plant operations. The decision summary did not comment on the applicants' concerns about noise, but the Ottawa District Office has advised the ECO that the acoustic berm/barrier, required as a condition in the C of A issued in April 2002, is now in place.

The ministry concluded that the "investigation findings did not support the allegations of off site property or vegetation damage that would result in a contravention of Section 14 of the Environmental Protection Act [*EPA*]," but MOE was silent about the other kinds of adverse effects that had been described by the applicants. Section 14 of the *EPA* states that no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an "adverse effect". The Act provides eight factors that MOE must consider when it determines whether there has been an adverse effect. These include: "injury or damage to property or to plant or animal life," "impairment of the quality of the natural environment for any use that can be made of it," "an adverse effect on the health of any person" and the "loss of enjoyment of normal use of property".

The applicants alleged that the emissions gave some people headaches and changed their living style by preventing them from leaving their windows open, hanging their clothes on the line or simply sitting, eating or barbecuing. Since the ministry found evidence that particulate emissions exceeded the point of impingement standards of Regulation 346 and contravened Regulation 349, this would tend to support the applicants' allegations. In our 2002/2003 annual report, the ECO expressed concern that MOE is not using all of the tools available to the ministry in conducting investigations.

The ECO believes that it would have been preferable if the investigation had been assigned to a different branch or district office, as was requested by the ECO at the outset. As noted, the Ottawa District Office had been involved in responding to the applicants' complaints about the asphalt plant in the past. This office also had conducted an earlier inspection of the plant. Moreover, the applicants were frustrated by MOE's handling of the complaints they had issued since 1998. As articulated in our 1997 annual report, the ECO encourages ministries to assign investigations to a branch or person without previous involvement or a direct interest in the particular issues. The involvement of a different branch or district allows a fresh and impartial perspective to be brought to bear on the matter.

The ECO believes that the ministry's decision to extend the deadline for completion of the investigation appears reasonable. The investigation involved on-site source testing and analysis, and more than one MOE office.

The ECO is encouraged that MOE informed the applicants that the requirement to bring the plant into compliance with emissions standards could potentially lead to the posting of a notice on the Environmental Registry. In doing so, the ministry made the applicants aware of a potential opportunity to comment (which did, in fact, materialize). However, the ECO has serious concerns about how the ministry used the Registry to give notice of proposals and decisions about Cs of A for the Miller Group Inc.'s asphalt plant in the between 2001 and early 2004. (Please refer to section 2 of the annual report for further discussion on the use of the Registry to post notices.)

MOE delayed posting a decision notice on its July 2001 proposal notice (IA01E1002) until February 2004, almost two years after the decision was made. Thus, the applicants were denied an opportunity to file an appeal for two years. Had the Registry notice been posted as soon as reasonably possible after the decision was made, the applicants could have sought leave to appeal in order to address their concerns. Consequently, the applicants felt compelled to file an application for investigation.

The ECO was also concerned about the inappropriate language used and lack of adequate information in both Registry notices for the Miller Group Inc., as they were originally posted on the Registry, and advised the ministry of such. Registry notices should be accurate and should contain sufficient information, including effective dates and a contact name. Notices should also use neutral language and omit any details that could possibly reveal the identity of commenters. The ECO is pleased that the ministry took steps to improve the quality of the notices.

The ECO also commends MOE for providing our office with a detailed response to our information request. The information provided helped clarify the nature and status of the reviews of the applications for amendment of the Miller Group Inc.'s C of A for air. However, the information about the C of A discussed in the July 2001 Registry proposal notice should have been shared with the applicants back in April 2002 when the decision was made and when they inquired about it over the following months.

The ECO will continue to monitor MOE's handling of this file to determine whether the changes in plant equipment and operation address the longstanding concerns of the applicants about the asphalt plant.

Review of Application I2002006:
Alleged *EPA* Contraventions by an Auto Wrecker
(Investigation Undertaken by MOE)

Background/Summary of Issues

The applicants allege contraventions under Section 14 of the *Environmental Protection Act* (*EPA*) by two private citizens. One of the applicants lives and owns a summer cottage resort on a property adjacent to the property owned by the alleged contravenors. The applicants stated that the neighbouring property is being used as a storage facility for dilapidated vehicles.

The applicants' primary concern is possible well-water contamination due to off-site migration of petroleum products from the neighbours' property. Test results indicated poor bacterial water quality and the applicants claimed that their water supply became "foul-smelling" sometime after the introduction of the dilapidated vehicles on the neighbouring property.

To support their allegations, the applicants provided a local newspaper article, which suggested that the neighbours' commercial activity is having an impact on the quality of water in the surrounding area. The article referred to the Muskoka Mobile Home Park in Kilworthy which, at the time, was under investigation by MOE after water samples indicated the presence of petroleum products. The applicants allege that the neighbours operate a car-demolishing site at the mobile home park in Kilworthy.

The neighbours' property is located in a residential-zoned area, rather than commercial. In May 2002, Gravenhurst Town Council gave final approval for a zoning amendment to permit the motor vehicle storage facility to continue at the property and be treated as a type of home occupation. However, the applicants claim that vehicle storage began prior to the amendment of the by-law. The applicants indicated that there had been an increase in vehicle traffic in the area that included a 50-foot truck delivering and removing vehicles, and that a gate and sheds had been installed on the property.

Finally, the applicants feel that permitting the vehicle storage facility on the neighbours' property is incongruent with the principle for development south of Gravenhurst's urban centre. The intention of the official plan is "to improve the façade of existing buildings and ensure high quality façades for new development."

In February 2004, the Gravenhurst Town Council revised the property standards by-law to prohibit the storage of any vehicle that does not have valid licence plates on residential property.

Where zoning by-laws permit, vehicles without valid licence plates must be stored in the side or rear yard and cannot be in a wrecked, discarded, dismantled, inoperative or abandoned condition.

Ministry Response
MOE investigated the allegation of adverse effects to the applicants' property from the neighbours' derelict motor vehicle site on July 4, 2002, prior to receiving this application for investigation on July 8, 2002. The MOE inspector found no indication of adverse effects from the neighbours' property. At the time of the investigation, the applicants provided the Ministry official with drinking water test results indicating poor bacterial water quality, upon which the inspector advised the applicants that poor bacterial water quality was not indicative of contamination from the derelict motor vehicles. When the inspector requested to inspect the applicants' well for possible construction problems, the inspector was refused access. As no adverse effects were identified, ministry staff recommended that the file be closed.

This was not the first time that the MOE had been contacted by the applicants regarding this site. In November 2001, the applicants raised concerns about derelict vehicles being stored on their neighbours' property and were advised by the local MOE office, that they should contact their local municipality.

Although MOE acknowledged receipt of the application and prepared a decision summary, MOE has not provided the ECO with a copy of the letter to the applicants.

ECO Comment
The ECO is pleased that MOE did conduct an investigation in July 2002 and supports MOE's decision to close this file. MOE found no evidence to suggest that the neighbours' property was the source of the bacterial contamination. Furthermore, bacterial contamination is not normally caused by derelict vehicles, and since MOE was not allowed to inspect the applicants' well, MOE would not have been able to substantiate the applicants' claims. However, the ECO is concerned about the ministry's tracking of correspondence related to this investigation. The ministry received this application for investigation on July 8, 2002 and indicated to the applicants that the investigation would be completed by November 5, 2002. However, the ECO did not receive formal notice of completion of the investigation until January 16, 2004. It is our understanding that the applicants were advised of the outcome but the ECO has been unable to confirm this information. The ECO is concerned that the MOE does not have complete records for this application.

Review of Application I2002011: Alleged *OWRA* and *Fisheries Act* Contraventions by Ontario Power Generation (Investigation Undertaken by MOE)

Background/Summary of Issues
In August 2002, the Sierra Club of Canada submitted an application which alleged that Ontario Power Generation (OPG) is in contravention of section 30(1) of the *Ontario Water Resources Act* (*OWRA*) and sections 35(1) and 36(3) of the federal *Fisheries Act*. The applicants publicized their actions with a news release. The applicants were represented by the Ontario office of the

Sierra Legal Defence Fund (SLDF), an environmental group that specializes in providing legal assistance, and they played a very active role in the handling of this file. According to the applicants, OPG's five coal-fired power plants are responsible for the deposition of mercury to Ontario waterbodies. Section 30(1) of the *OWRA* prohibits the discharge of any material into Ontario's waters that "may impair" water quality. Section 35(1) of the *Fisheries Act* states that no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat in Canada. Section 36(3) of the same Act prohibits the deposit of a "deleterious" substance into Canadian waters frequented by fish.

The Sierra Club requested an investigation to determine: Is OPG emitting mercury? Is mercury a material that "may impair" under the *OWRA* or a "deleterious" substance under the federal *Fisheries Act*? Is any mercury from OPG plants reaching Ontario waters or Canadian fisheries waters? And if the answers to the preceding questions are yes, then which OPG directors, officers or other officials caused or permitted these discharges or deposits? The applicants requested that the investigation cover the period from April 1, 1999, when OPG took over the power generating assets of Ontario Hydro, to August 2002.

The applicants provided evidence and arguments in support of their allegations. They cited reports that reveal that since 1999, OPG's five coal-burning power plants have emitted more than 2000 kg of mercury into Ontario's air. Mercury is a natural constituent of coal and is released during burning.

The applicants also cited a number of sources which describe the harmful ecosystem and human health impacts of mercury. They noted that the Ministry of the Environment (MOE) itself has described mercury as "a potent-nerve toxin that builds up in the foodchain," that mercury is listed as a "toxic substance" under the *Canadian Environmental Protection Act* and that the substance persists in the environment. The applicants cited a MOE report which states that "studies suggest that even low levels of exposure can cause neurological and developmental impairment in the fetus and young child," and that "Mercury impacts in Ontario and in Canada include restrictions on eating sportfish, resulting lifestyle changes for aboriginal groups and mortality and reproductive impacts in loon and otter populations." Upon entering the aquatic environment, mercury can be converted to methylmercury by bacteria, a form of mercury which is absorbed or ingested by aquatic organisms. Methylmercury bioaccumulates in aquatic organisms and biomagnifies as it moves up the food chain, reaching levels in predatory fish and aquatic organisms which are much higher than those found in surrounding waters (please refer to pages 116-121 of this year's annual report for further discussion of the impacts of mercury and its movement in the environment).

The applicants argued that there is strong evidence that some portion of OPG's mercury emissions enter Ontario's waters and/or Canada's fisheries waters. They acknowledged that it may not be possible to quantify the amount of mercury released by OPG which makes its way into Ontario and/or Canadian waters and discussed why this difficulty exists. However, according to the applicants, it is not necessary to quantify the deposition of mercury. They stated: "Mercury is toxic therefore the offence is complete when any amount of OPG's emissions of mercury enter our waters. Since the capacity of a water body to dilute mercury is not a defense therefore it is not necessary to know precisely how much is entering our lakes." The application included a 15-page analysis of legal issues, including a three-page discussion of the burden of proof on the Crown and whether MOE and MNR lawyers would have to show a serious impact. In this section, the applicants cited and discussed relevant case law, including *R. v. Inco Ltd.*, an *OWRA* case heard before the Ontario Court of Appeal in June 2001, which established a two-tier test for the impairment of water quality:

> Inherently toxic substances will always fail that test, reflecting zero-tolerance for discharging materials that, by their nature, may impair water quality. If the material in the discharge is not inherently toxic, then it will be necessary to consider the quantity and concentration of the discharge as well as the timeframe over which the discharge took place.

The applicants argued that mercury should be considered an inherently toxic substance under the *OWRA*.

After receiving the application, ECO staff advised the applicants that MNR had returned responsibility for enforcing Section 35(1) of the *Fisheries Act* to the federal Department of Fisheries and Oceans (DFO) in September 1997. The ECO suggested that the applicants consider submitting their concerns about violations of this provision of the *Fisheries Act* to DFO or to the federal Commissioner of the Environment and Sustainable Development. The ECO forwarded the application to both MOE and MNR. In the cover letter to MOE, the ECO indicated that the alleged contraventions of s.30(1) of the *OWRA* are relevant to the ministry and requested that the ministry assist in the investigation into the alleged contravention of s.36(3) of the *Fisheries Act* "in accordance with the request made by the Ministry of Natural Resources in February 2002 correspondence to the Environmental Commissioner." In the letter to MNR, the ECO indicated that the alleged contraventions of the *Fisheries Act* s.36(3) are relevant to the ministry. MNR denied the applicants' request for investigation, stating that MNR is not responsible for enforcement of s.36(3) of the *Fisheries Act* with respect to contraventions related to chemical pollution. MNR's handling of the application was reviewed by the ECO in our 2002/2003 Supplement.

After MOE had received their application, the applicants submitted, on two different occasions, additional information which they believed to be important to their case. The first piece – a 13-page technical document "Measurement of Speciated Mercury Emissions from Ontario Hydro's Thunder Bay and Atikokan Generating Stations" – was received by the ECO approximately one week after the original submission was received and after it had been forwarded to MOE. The second piece of evidence – a two-page summary of a phone conversation with an anonymous caller – was received by the ECO 41 days after the original submission was made.

Ministry Response

MOE undertook an investigation of OPG under the *OWRA*. The ministry modified the investigation completion date several times. It reset the start date of the investigation twice after receiving the two pieces of additional information submitted by the applicants. In both instances, MOE reset the start date of the investigation to the dates on which they were received (establishing a completion date of January 28, 2003 a reporting date of February 28, 2003 after receiving the second set of information). Subsequently, in a letter to the applicants on February 28, 2003, the ministry indicated that it was unable to meet the January 28, 2003 completion date and that it would report on the outcome of the investigation on April 30, 2003. The ministry ultimately reported to the applicants on the outcome of the investigation on May 31, 2003.

In its report, MOE denied that it has responsibility for conducting an investigation of OPG's alleged contraventions of s. 36(3) of the *Fisheries Act*. The ministry acknowledged that it has, on occasion, "utilized s. 36(3) of the *FA* to respond to deleterious substances," but contended that "the investigation and enforcement of the *FA* is the responsibility of Environment Canada." MOE noted that the applicants had also provided the federal department with the application material, that the ministry has been in contact with the federal department and that it would "be pleased to provide assistance as appropriate." MOE also contended that "the *OWRA* generally is a more effective tool for the Ministry as it provides for a substantially higher penalty and allowance for issuance of Ministry orders to ensure clean-up and restoration."

The ministry did conduct an investigation under the *OWRA*, but it decided not to lay charges under the Act. "It has been determined that there is not, at this time, a reasonable prospect of a successful prosecution of OPG or any of its officers or directors with respect to the mercury emissions from the coal-fired plants, nor would it now be in the public interest to commence such a prosecution under the *OWRA*." The investigation was co-ordinated by the MOE's Central Region Office and included personnel and input from at least 11 branches and district offices of the ministry involved with the subject matter of the investigation.

In its report on the investigation, MOE did acknowledge that OPG mercury emissions to air are occurring. MOE also recognized the toxicity of mercury; MOE is "aware of the potential risks associated with the release of mercury." Further, the ministry agreed with the applicants' assertion that the deposition of mercury to water is occurring: "at least some molecules of mercury discharged by coal-burning power plants operated by OPG in Ontario do make their way into waterbodies in Ontario and may be accumulated into fish in some manner."

However, MOE interpreted the case law under the *OWRA* to state that it is not sufficient to establish that OPG is responsible for some deposition of mercury to water. MOE stated: "It is the view of the Ministry that in order to satisfy all the elements of the s.30(1) *OWRA* offence there must be clear evidence that the OPG emissions of mercury can impair the quality of the water within the meaning of 'impairment' as defined by the Court of Appeal in the [June 2001 *Inco Ltd.*] case" and further that, "it is not clear that the quality and concentration of the OPG mercury air emissions are "inherently toxic substances" as described in the first test in the Inco case." The ministry suggested, rather, that in order to prosecute successfully under the *OWRA*, it would be necessary to quantify OPG's mercury deposition to Ontario waters.

The ministry argued that its interpretation of the evidentiary standard of the *OWRA* is an appropriate one. It stated that it is simply not feasible to characterize mercury as a substance requiring a "zero tolerance" level at this time as mercury occurs naturally in the environment and is emitted by a number of industries in Canada and the U.S. MOE pointed out that its interpretation is consistent with the approach taken by the provincial government through its regulation of mercury as a permitted discharge under Regulation 346 made under the *Environmental Protection Act (EPA)*, R.R.O. 1990. The approach is also consistent with the 2002 Canada-Ontario Agreement (COA) and the Canadian Council of Ministers of the

Environment (CCME) commitment to develop a mercury standard for coal-fired plants by 2005. MOE suggested that differences in the evidentiary standard under the *Fisheries Act* and *OWRA* exist. It stated: "The *FA*, on the other hand, is more open to the cumulative effect argument because of its focus on 'deleterious substances' as being those which contribute to the 'process of degradation' of 'water frequented by fish'".

MOE asserted that it is beyond the capacity of investigators to quantify OPG's mercury deposition to water and to, thus, meet the evidentiary standard under the *OWRA*. It stated: "The Ministry is of the view that the mercury emissions from any OPG facility cannot be directly and convincingly connected in a quantifiable and conclusive manner to the impairment of the water and fisheries and/or fisheries habitat." MOE pointed out that the emissions of mercury from any one facility are comprised of several different forms of mercury which behave differently in the environment. While some forms, i.e., particulate and ionic, tend to deposit locally, the elemental form may remain in the atmosphere for many months. The elemental mercury mixes with elemental mercury from other local, regional and global sources "so as to be indistinguishable from the mercury emitted from these other sources." Furthermore, the methodologies for measuring the deposition of mercury – whether local or distant – from any one source "are of insufficient quality to be relied on."

MOE also asserted that "it is necessary to determine and/or estimate the relative quantities that would fall directly as well as the proportion of that mercury falling onto land that will leach and/or run-off into waterbodies." Moreover, the methods for directly measuring, not only the deposition, but also the methylation, accumulation and food-chain biomagnification rates of mercury "are not available."

MOE further pointed out that all five of OPG's plants possess Certificates of Approval (Cs of A) for Air under section 9 of the *EPA* and that they have participated in the ministry's Selected Targets for Air Compliance (STAC) Program, a program which requires facilities to submit Emissions Summary and Dispersion Modelling reports. The ministry noted that the reviews done under both the C of A process and the STAC program reveal that the ministry is in compliance with the province's Point of Impingement standard for mercury. In fact "all five OPG coal-fired plants are well below the mercury limit."

In an appendix to its report, MOE described a variety of initiatives and actions being taken by the government and the ministry related to mercury emissions and discharges from OPG's coal-fired power plants. It discussed, among others, the conservative government's commitment to phase out coal-fired power generating stations no later than 2015; the ministry's plan to develop and/or update air guidelines/standards for priority toxic contaminants, including mercury; and the CCME efforts to develop national emissions standards for reducing mercury emissions from coal-fired plants. The ministry noted that the CCME initiative "clearly addresses the objectives of the [a]pplicants' request for an investigation, indicating that the Government of Ontario is moving to address the issue of concern with a significant and very public program." The ministry, acting as the lead jurisdiction in the development of the emission standard, acknowledged that the development of the standard has been delayed. It was previously slated for completion by fall 2002 – the review is now expected to "take place in 2005 after the United States regulations are finalized as required under the U.S. *Clean Air Act*." In the interim, MOE committed to continuing its discussions with OPG regarding the reduction of air emissions and to focusing on "the evaluation of the efficacy of emerging technologies for mercury control in the pursuit of commercially demonstrated and viable equipment."

Other Information

MOE and the Fisheries Act

This application highlights past ECO concerns regarding the enforcement of the federal *Fisheries Act* in Ontario and the role of MOE therein. In our 2001/2002 annual report, the ECO reported that MOE denies that it has responsibility for enforcing s.36(3) of the *Fisheries Act*. The report noted, however, that MOE had informed the ECO that the ministry is accountable for investigating chemical discharges, such as mercury, into water. In an August 2002 update to the ECO, MOE articulated its role vis-à-vis the *Fisheries Act*, stating that a revised inter-agency Fish Habitat Compliance Protocol would explain that MOE would "continue to assist Federal authorities in collecting evidence and proceeding with investigations when appropriate."

In February 2004, MOE advised the ECO that it would be piloting its revised and interim Fish Habitat Compliance Protocol developed by the inter-agency Compliance Working Group of the Fish Habitat Advisory Group. The group consists of representatives from MOE, MNR, Ministry of Agriculture and Food (OMAF), EC, DFO, Parks Canada and Conservation Authorities. In November 2001 the working group committed to revising the compliance protocol (first issued in February 2000), in part to clarify further the role of MOE vis-à-vis *Fisheries Act* enforcement. The group expects to consult the public on the revised protocol through the Environmental Registry once the pilot phase is completed in April 2005. (For further information, please refer to pages 160-161 of this year's annual report).

In our 2001/2002 annual report, the ECO remarked that there are considerable differences in how the *OWRA* and the *Fisheries Act* are interpreted, administered and enforced. Under s.36(3) of the *Fisheries Act*, "it is sufficient to show that a deleterious substance has been discharged into waters inhabited by fish. In contrast, a prosecutor wishing to obtain a conviction under the general prohibition in s. 30(1) of the *OWRA* must show some likelihood of impairment or toxicity.... Many experts believe that this difference makes s.36(3) a far superior tool when compared with s.30(1) of the *OWRA*." In a case decided in May 2004 involving a former landfill in the City of Kingston, the Ontario Court of Appeal affirmed the ECO's interpretation that a lower evidentiary burden exists under the *Fisheries Act* and that it is sufficient to show that a deleterious substance has been discharged.

In our 2001/2002 report, the ECO recommended that MOE "amend the *Ontario Water Resources Act* so that a level of protection equivalent to that found in Section 36(3) of the *Fisheries Act* is contained in Ontario water protection legislation." The ECO saw a need for this amendment after learning that both MNR and MOE were denying that they have responsibility for the enforcement of the *Fisheries Act* in Ontario.

SLDF's Response to MOE's Report on the Investigation

In January 2004, SLDF wrote to the Minister of the Environment. SLDF asserted that MOE was wrong in its opinion that mercury is not an inherently toxic substance under the *OWRA*, but added that "if the MOE is right, its determination simply underlines a weakness in the *OWRA* as it relates to contaminants in general." SLDF stated that the standard of having to prove that emissions from particular sources cause an impact in a receiving water body is too high because, as MOE itself argued in its report, the scientific knowledge and methods which would permit this kind of analysis are not sufficiently advanced. They argued: "If the law is to protect our environment, however, then it must have the capacity to prevent discharges of substances that pose a risk, even if science cannot precisely define what that risk will be in particular circumstances."

Counsel for the applicants also raised concerns about MOE's comment that the *OWRA* "is directed at the effects of a particular discharge rather than the cumulative effect of many small discharges. The *Fisheries Act*, on the other hand is more open to the cumulative effect argument because of its focus on "deleterious substances" as being those which contribute to the 'process of degradation' of 'water frequented by fish.'" SLDF conceded that MOE's interpretation of s. 30(1) of the *OWRA* may be correct. However, they pointed out that "our lakes are contaminated with mercury precisely because of ongoing 'small' discharges" and noted that MOE's comment "suggests that a single discharge can be prosecuted but an ongoing one that does more damage cannot." The letter encouraged the minister to amend s. 30(1) of the *OWRA* to clarify "that the Crown need only prove that the material itself may impair, as in the case of s. 36(3) of the *Fisheries Act* (i.e. absent any consideration of the discharge or the receiving water body)." SLDF indicated that its recommendation is consistent with the ECO's recommendation in our 2001/2002 annual report.

SLDF also stated: "We acknowledge the existing gaps in scientific knowledge on tracing mercury from industrial sources to its deposition into specific water bodies. We expected, however, that before the MOE simply dismissed our request for investigation it would attempt to gather additional evidence not easily available to a non-profit group, such as the type of coal used (which influences the amount of mercury), the flue temperature, and atmospheric conditions, that could feed into a dispersion model or other analysis. Computer modeling is a tool that has successfully been used in North American courts as evidence."

In May 2004, the Minister of the Environment responded to SLDF, stating that the government is committed to "developing cleaner energy sources to replace coal-fired generation in Ontario by 2007." The letter noted that the Minister of Energy had recently announced the start of a process to seek new replacement electricity generating capacity for about one third of current plants so that the government can phase out existing coal plants. The Minister of Energy also indicated that the Lakeview Generating Station is slated to cease burning coal by April 2005.

The Reduction of Mercury Emissions from Coal Plants: Other Initiatives and Activities
There are a number of activities under way at the provincial, national and international levels, which may lead to reductions in mercury emissions from Ontario's coal plants. As noted, the Canadian Council of Ministers of the Environment (CCME) has committed to adopting a mercury standard for coal-powered plants in Canada. In a notice issued in June 2003, the organization announced its commitment "to develop a Canada-wide Standard [CWS] by 2005 to reduce mercury emissions from the coal-fired electric power generation sector by 2010, to explore the national capture of mercury from coal burned in the range of 60-90 per cent, and to align with US standards for mercury." The CCME has already established CWSs for mercury

for the two other major emission sources, base-metal smelters and waste incinerators as well as for mercury-containing lamps and dental waste amalgam. The coal-fired electric power generation sector is the "largest single remaining man-made source of mercury emissions in Canada." Critics have pointed out that the development of a standard for the sector has been slow and that Ontario has actually delayed progress due to concerns over the implications for OPG's coal-fired plants.

Critics have also argued that, as there already exists equipment that is able to achieve a 90 per cent reduction in mercury emissions, there is no need for a more lenient target. Commercially available technology used to capture air pollutants, such as particulates and sulphur dioxide, is considered to be effective in capturing mercury in flue gas, leading to reductions of up to 60 to 90 per cent depending on the coal type and the conditions. While mercury-specific emissions reduction technology is not yet widely available for use at power plants, it has been used successfully for years by the incinerator industry. According to OPG, demonstration projects using the technology have shown that "considerable mercury capture could be achieved, in the 70 to 90 per cent range, depending on fuel type and conditions. Much of the information is readily applicable to OPG stations."

The CCME's June 2003 announcement indicates that the standard to be adopted will reflect standards established in the U.S.: "With the growing integration of the continental energy market, it is in Canada's best interests to develop a Canada-wide Standard for the EPG [Electric Power Generation] sector that takes U.S. actions into account." The U.S. Environmental Protection Agency (EPA) is mandated to complete a new mercury rule for the electric power sector by March 2005. At present there is considerable debate under way in the U.S. around how stringent the standard should be and how it should be implemented. When the CCME issued its notice, the U.S. EPA was on pace to issue a rule to regulate mercury using maximum achievable control technologies. However, in December 2003 the agency instead proposed a relaxed standard that would require the industry to reduce mercury emissions only 29 per cent by 2007 and 70 per cent by 2018.

As the appendix to the MOE report also noted, the government of the day had committed to phase out coal plants by 2015. The current Ontario government campaigned on a platform of phasing out the plants by 2007 and, as noted in the minister's letter to SLDF of May 2004, has taken some steps towards this promise. However, there may be practical constraints that will frustrate Ontario's commitment to meet the 2007 phase out. In its January 2004 final report to the Minister of Energy, the Electricity Conservation & Supply Task Force recommended that "to avoid major supply risks, coal plants may need to be kept in operation until adequate replacement generation and demand reduction measures are in place."

It is noteworthy that other efforts have been made by Canadian and U.S. health and environmental groups to put pressure on Canadian governments to act on this problem. For example, in August 2003, 49 Canadian and U.S. health and environmental non-governmental organizations filed a citizen submission with the Commission on Environmental Cooperation (CEC), an international organization created by Canada, U.S. and Mexico under the North American Agreement on Environmental Cooperation. The submission alleged that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* as well as sections of the

Canadian Environmental Protection Act against OPG's Nanticoke, Lambton and Lakeview coal power plants. The submitters raised concerns about mercury, nitrogen oxide and sulphur dioxide emissions from the plants. In September 2003, the CEC determined that the submission warranted a response from the Government of Canada. The federal government's response, issued in November 2003, indicated that mercury emissions are being addressed through the CCME mercury standard development process. It also stated "At this time, there is insufficient evidence of a causal link between mercury emissions originating from the Nanticoke, Lambton or Lakeview facilities with the mercury found in fish-bearing waters," and that it has undertaken its mercury inspection program for this reason. The inspection program includes sampling of OPG's mercury emissions and the development of models as "There are currently no comprehensive models available that can deal with the mercury emissions from these stacks." The federal government's response emphasized that both tasks are complex and that modelling, in particular, is in its infancy and the subject of much scientific debate. The CEC is currently reviewed the response and in May 2004 determined that the development of a factual record of the mater is not warranted. The CEC acknowledged that the application of s. 36(3) of the *Fisheries Act* to air emissions which are eventually deposited into water frequested by fish is untested. It indicated that Environment Canada's inspection program is a "significant step" and acknowledged Ontario's plans to close "some or all of OPG's coal-fired facilities."

ECO Comment

A number of issues arose from the way in which the application was handled. The *EBR* does not have a clear procedure for the ECO and ministries to follow when applicants file additional material in support of an application. It was therefore problematic for the applicants to have made the two additional submissions; the case that was made in the application should have been crystallized at the time of the original submission. The ECO does, however, recognize that the applicants had legitimate concerns and provided new and potentially useful information in both instances. In order to be able to better address situations such as these in the future, the ECO believes that law reform may be required. Amendments to the *EBR* or the *EBR* General Regulation to provide clear guidelines and/or mechanisms for the resolution of these situations may be appropriate. Such mechanisms may include allowing both sides to make representations to the ECO and requiring the ECO to make a timely ruling on an extension for a ministry to consider an application. As a general rule, applicants should strive to submit complete, self-contained applications.

After having reset the start date for the investigation twice, the deadline for reporting the outcome of the investigation was set to February 28, 2003 (with an investigation completion date of January 28, 2003). MOE did not, however, meet this deadline. Moreover, it failed to inform the applicants, within the 120-day time limit as required by the section 70(1) of the *EBR*, that it would require additional time to complete the investigation. In a letter to the applicants on February 28, 2003, the ministry indicated that it would report on the outcome of the investigation on April 30, 2003. However, the ministry again failed to meet its deadline, ultimately reporting to the applicants on May 31, 2003. The ministry should have notified the applicants of the need to extend the deadline for completion within 120 days of initiating its application, as required. Moreover, MOE should have been realistic the second time (i.e., not promised it would report on April 30, 2003) it revised its deadline and worked hard to meet the deadline, given that the start date had already been revised twice and the deadline extended once.

In addition, MOE should have informed the applicants that it wasn't investigating under the *Fisheries Act* within 60 days of its receipt of the application. Its failure to do so had a bearing on the applicants right to sue under section 84 of the *EBR*.

While the ministry did make it clear that it would not be pursuing charges under the *OWRA* (or the *Fisheries Act*), its report on the investigation could have delved further into a discussion on *why* it believes that it is necessary to quantify mercury deposits to Ontario waters to prosecute successfully under the Act. It could have included more than a passing reference to the relevant case law. Specifically, the ministry might have elaborated on its statement: "it is not clear that the quality and concentration of the OPG mercury air emissions are "inherently toxic substances" as described in the first test in the Inco case." The applicants allotted several pages to a discussion of relevant case law in an effort to make the case to the contrary – that "a toxic material such as mercury should be considered without reference to the surrounding circumstances." Furthermore, MOE's position on the need to quantify deposits to water led to its decision to refuse the applicants' request. While the ministry referred in passing to one *OWRA* case, it devoted a fair portion of its response, in contrast, to a discussion of the difficulties involved in measuring mercury deposition to Ontario waters. In its report, MOE also failed to discuss the use of other compliance tools.

The ministry's report did include an appendix with useful information. The appendix informed the applicants of a range of initiatives related to their concerns. It included information on the public participation and consultation opportunities available through these initiatives, as well as the names of contacts for further information. The ECO encourages the ministry to provide applicants with similar appendices in future reports.

While the ministry did conduct an "investigation" under the *OWRA*, its investigation appears to have consisted of a paper review of the evidence provided by the applicants. As noted, the applicants asserted in their January 2004 letter to the minister that MOE could have taken and reported on additional steps to advance its understanding of the link between mercury emissions from Ontario's coal plants and environmental and human health impacts. The ECO agrees with the applicants, particularly given that the government did not intend to phase out Ontario's coal plants until 2015 at the time that the report was written. Even if MOE believes that it is simply not possible at present to collect all of the information necessary for a successful prosecution under the *OWRA*, any additional information would have advanced its own and the public's understanding of this important issue. Any new information could have also been forwarded to Environment Canada for consideration in its inspection program under the *Fisheries Act*.

The ECO also agrees with the applicants that the ministry's interpretation of the *Inco* decision seems questionable in this case, given the well-documented environmental effects of mercury.

The ECO believes that MOE needs to take firm action on mercury emissions from coal-fired power plants, especially if the Ontario government decides to extend the lifespan of existing facilities beyond 2007. The ecological and human health impacts of mercury are well-documented and coal plants are known to be a significant source of emissions.

Review of Application I2002019:
Alleged *EPA* Contravention – Tobacco Leaf Burning
(Investigation Undertaken by MOE)

Background/Summary of Issues

In December 2002, the applicants sent an application for investigation to the ECO, in which they alleged that their neighbour was burning large quantities of unusable tobacco leaves from August until September annually. They contended that this activity was in contravention of s. 14(1) of the *Environmental Protection Act (EPA)*, as it has adversely affected their health and has been a nuisance. In their application, the applicants included pictures of smoke issuing from the neighbour's barn and a heavy layer of smoke in the air above various fields. The smoke sometimes engulfed their horse barns. They contended that on days that air quality warnings are issued it was inappropriate for their neighbour to be contributing to poor quality air by burning tobacco leaves.

This was not the first time that the applicants had raised concerns about this activity. In September 1994, the applicants notified MOE that the neighbour had been burning tobacco leaves. In response, an Environmental Officer from the MOE's London District Office advised the neighbour that if this practice was causing an adverse effect, a charge could be laid under s. 14(1) of the *EPA*. At that time the Environmental Officer instructed the neighbour of precautions that could be taken to avoid adversely affecting the applicants. However, no other enforcement action was taken at that time and it appears that the offending activity continued every August and September for the next eight years.

Ministry Response

MOE agreed to undertake this investigation. On May 9, 2003, MOE inspected the neighbour's farm. MOE then contacted the Ontario Ministry of Agriculture and Food and was advised that burning tobacco leaves is not a normal farm practice. MOE advised the neighbour that if this practice continued MOE would pursue mandatory measures to ensure that it was stopped. MOE described its investigation in a response to the applicants, and provided a contact name and telephone number to call if they had further questions.

ECO Comment

The ECO is pleased that MOE agreed to undertake an investigation into alleged adverse effects caused by smoke and that advice was sought from the Ministry of Agriculture and Food. As noted in our 2000/2001 annual report, MOE has sometimes referred smoke complaints to the local municipality rather than investigating them itself. In its response MOE provided the applicants with contact information if they had questions, and advised them that mandatory measures would be pursued if MOE is able to substantiate further complaints. However, the onus remained on the applicants to complain if burning continued. Since this was not the first time that the MOE had investigated and advised the neighbour that charges could be laid under s.14(1) of the *EPA*, it would have been appropriate for MOE to have taken enforcement action such as prosecution or issuing some type of order against the neighbour. Although it is unclear from MOE's response to the applicants whether or not MOE actually found evidence that tobacco leaves had been burned when it visited in May 2003, this information would have been easily obtained in August since it was alleged to be occurring daily.

In February 2004, the applicants advised the ECO that they called MOE in September 2003 to report that the neighbour had resumed burning tobacco leaves in August despite MOE's warning in May 2003. After investigating, MOE issued a Provincial Officer's Order requiring the neighbour to immediately discontinue this practice and to consult with the Ministry of Agriculture and Food on a recommended method of disposal for spoiled tobacco leaves. The ECO is pleased that the applicants called MOE in September as advised the previous spring and that MOE took action.

Review of Application I2002020:
Alleged *EPA* and *OWRA* Contraventions by the City of Ottawa
(Investigation Undertaken by MOE)

Background/Summary of Issues

This application focuses on leaking sewage lagoons near Ottawa. The applicants in this case allege that the City of Ottawa has allowed raw sewage to discharge on a continuing basis into the natural environment, and that this is causing or is likely to cause an adverse effect. The applicants allege that the Munster sewage lagoons in Goulbourn Township are experiencing ongoing sewage outbreaks, as well as periodic overflow events into adjoining ditches, and that the ditches flow directly back into the Jock River.

The sewage lagoons at Munster have been a long-standing environmental issue. The hamlet of Munster was planned in the mid 1960s with a lagoon sewage system, which was designed for an ultimate capacity to serve 1,500 people. The Certificate of Approval issued to the lagoon system in 1970 included a condition that the facility would be removed from operation when a trunk sanitary sewer was available, indicating that the lagoon system was not intended to be a permanent, long-term arrangement. By the mid 1990s, it was recognized that the lagoon system was inadequate and needed to be upgraded. The first proposal, in early 1996, was to expand the existing lagoon and spray irrigation system. This proposal sparked concerns by local residents and requests for a bump-up to a full environmental assessment under the *Environmental Assessment Act*.

In early 1998, the City of Ottawa began to evaluate other treatment alternatives, with the help of consulting engineers. By May of 1999, the consultants had studied five alternative solutions, and recommended that Munster be connected to Ottawa's central sewage collection and treatment system by means of a 12 kilometre forcemain pipeline, that would be routed through the nearby hamlet of Richmond. The City of Ottawa decided in favour of a pipeline, but this approach also raised public concerns, including more bump-up requests and an appeal to the Ontario Municipal Board (OMB). Briefly, the public concerns included the risk that the sewage pipeline, being under pressure, might leak and contaminate private drinking water wells situated along the route.

A highly contentious OMB hearing then followed, including three weeks of hearing time and over 200 exhibits. The OMB decision, rendered in June 2001, advised the City of Ottawa to re-evaluate three of the five treatment alternatives, and to use a different consulting company for a fresh perspective on the many technical issues. The City of Ottawa did so, and by December 2002, the new consultant had determined that all three alternatives would work from an environmental perspective, but that the pipeline would be most expensive. The new consultant recommended that the city proceed with either of two on-site communal wastewater treatment systems. The city then requested additional re-evaluations of expected construction costs, which indicated that over a very long-term life cycle of 60-90 years, the projected cost of the pipeline was comparable to that of the two alternatives. Furthermore, since the pipeline had approval under the *Environmental Assessment Act*, it could be in place 12-18 months sooner than the alternatives. The city has since re-confirmed its intention to build the pipeline. So far, the city of Ottawa has spent over six million dollars on the process of evaluating and defending alternative ways of treating the sewage of Munster. The total capital costs of the pipeline are expected to be a further seven or eight million dollars.

During all this time, the Munster sewage lagoons have continued to operate. As evidence of environmental problems at the lagoons, the applicants provided a copy of a 1994 Compliance Inspection Report prepared by MOE. This report noted that it was well known that the lagoon system was seriously under-designed and overloaded hydraulically. The lagoons did not have enough storage volume to store sewage between spray irrigation periods, and the spray irrigation lands also did not have sufficient capacity to accept the hydraulic volume sprayed. The report noted that approximately 60 per cent of the incoming sewage flow was unaccounted for, and was likely either leaking through the sidewalls of the berms to surface drains, or through the bottom of the lagoon. MOE's 1994 report concluded with a recommendation that "the problems with leakage from this lagoon system must be resolved."

According to the applicants, their own visual inspections found that ditches near the lagoons remained wet even during severe drought conditions of the past three years. The ditches flow directly to the Jock River. However, the applicants did not include or cite any recent (post 1994) MOE compliance reports.

To address the problem of excess hydraulic load, the City of Ottawa began in 1997 to transport excess sewage from the Munster lagoons by tanker truck to the city's main sewage treatment plant, at a cost of approximately $500,000 each year. While this apparently resolved the problem of lagoons overflowing into ditches, it did not resolve the leaking from the bottom of the lagoons. In 1998, an MOE operations report recognized that the lagoons are leaking to the water table and that impacts to the shallow bedrock aquifer were likely.

While the subject matter of this *EBR* application focused strictly on the inadequacy of the existing sewage lagoons, the applicants also have long-standing concerns about the environmental risks of the pipeline solution. In correspondence copied to several Cabinet ministers and to the ECO, one of the applicants illustrated the risks of pipeline breaks by noting that a forcemain pipeline from the village of Richmond to Ottawa has had five pipeline breaks since installation.

In December 2003, the ECO received a second application for investigation (I2003008) relating to this same project, which alleged contraventions of the *Environmental Assessment Act* by the City of Ottawa. The ECO's review of this application is found on pages 326-331 of the Supplement.

Ministry Response

MOE decided to carry out an *EBR* investigation. A few weeks after receiving the application for investigation, MOE staff met with staff of the City of Ottawa to discuss the Munster sewage lagoons. In March 2003, MOE followed up with a letter to city staff, in which the ministry formally requested an update on the city's action plan for upgrading the Munster sewage system, to be submitted by April 30, 2003. MOE's letter also reconfirmed that "the previously selected pipeline option can proceed under the existing 1999 Munster Hamlet Environmental Study Report under the *Environmental Assessment Act*. The Ministry continues to view the proposed pipeline as an environmentally acceptable solution." The letter also indicated that any alternative solution would have to be selected in accordance with requirements of the *Environmental Assessment Act*, including the filing of an addendum and the re-evaluation of previously reviewed alternatives. The letter emphasized that it was the city's decision on how to proceed, but that timing should be a key consideration, since there had already been long delays in resolving this matter.

MOE sent the results of the *EBR* investigation to the applicants on June 23, 2003, in the form of a two-page decision summary. The ministry's investigation focused on monitoring data from 1998 onward, and determined that the data do not support the allegation that sewage is being discharged to the Jock River or tributaries, to cause or be likely to cause an adverse effect.

MOE reviewed ministry inspection reports for 2001 and 2002, and found no evidence of direct discharge from the Munster lagoons to adjacent ditches or to the Jock River. MOE noted that level sensors were installed in 1997, and there were no indications that lagoon levels have been exceeded since then. This was the year that the City of Ottawa began transporting excess sewage by tanker from the Munster Lagoons to the city's main sewage treatment plant.

MOE acknowledged that the lagoon was leaking to the water table and that impacts to the shallow bedrock aquifer were likely. But the ministry's decision summary stated that "at the present time there has been no indication of impacts to the two municipal wells located 400 to 500 metres north of the lagoons."

Among other things, the applicants had alleged that the terms and conditions of the Certificates of Approval for the sewage treatment facility were not being complied with. When the lagoon system was first approved in 1970, three special terms and conditions were specified:

1. the contents of the waste stabilization ponds are to be sprayed onto adjoining lands when the land is not frozen or snow covered.

2. the operation of the sewage treatment facilities are to be controlled in such a manner that sewage is not discharged either directly or indirectly to a tributary of the Jock River or the Jock River.

3. the sewage treatment facilities will be removed from operation when a trunk sanitary sewer is available and connection made to the trunk sanitary sewer.

MOE responded that the ministry's review had found no evidence to support the allegation that these terms and conditions were not being met.

MOE noted that the sewage facilities are being operated under a voluntary abatement agreement between MOE and the City of Ottawa. The voluntary abatement program has been agreed to annually since 1997, and is a temporary measure during the time needed to plan, design and build new or alternative facilities.

MOE noted that "any additional delays or findings of adverse effects could inaugurate mandatory abatement requirements." However, MOE did not indicate what those mandatory abatement requirements might be, or set a deadline.

MOE informed the applicants that there had been a recent recommendation to city council to approve putting in place a pipeline. However, MOE did not explain that MOE itself also considers the pipeline approach to be an environmentally acceptable solution.

ECO Comment

Allegations of Sewage Leaking to Jock River

MOE carried out a reasonable investigation in response to this application. MOE did not do a fresh site inspection, but since there were recent (2001, 2002) compliance reports available to review, a site inspection was probably not necessary. In any case, MOE acknowledges that there are serious problems with the existing lagoon system, and there has been a short-term and admittedly band-aid solution in place since 1997, when the city began to truck away excess sewage. While MOE acknowledges that the lagoons are leaking to the shallow underground aquifer, the ministry notes that the city remains committed to upgrading or replacing the system.

MOE's investigation was carried out by the same office that has overseen the sewage lagoons since their approval in 1970. It would have been preferable for MOE to have assigned this investigation to another district office, to allow for a fresh perspective on the matter.

It is also not clear why MOE did not share with the applicants the advice that the ministry gave the city about the EA status of the three alternative treatment options. All parties to this issue are aware that the lagoons are still leaking because there is an ongoing dispute about the best engineering solution. The position of the ministry on the matter is very relevant. MOE could have clarified for the applicants that the ministry "continues to view the proposed pipeline as an environmentally acceptable solution", and that "the previously selected pipeline option can proceed under the existing 1999 Munster Hamlet Environmental Study Report under the *Environmental Assessment Act*." While the applicants, who oppose the pipeline, might not welcome this news, it would have improved the overall transparency of the issue.

MOE says it inspects the lagoon system regularly, and has the ability to end the voluntary abatement program at any time. MOE also notes that "any additional delays or findings of adverse effects could inaugurate mandatory abatement requirements."

The ECO suggests an interim option for MOE's consideration: the ministry could order the city to promptly upgrade and line one or more of the existing lagoons to protect the shallow aquifer.

until the long-term sewage management approach is finalized and constructed. This might be a sensible investment, since all three alternatives that have been under consideration will require the continuing use of a portion of the existing lagoons for at least temporary storage of peak flows and for emergencies. They would each require the ongoing use of at least one cell of the existing lagoons, and the costs of improving the lagoons are carried in all three options.

The Larger Issue: Resolving the Controversy about Treatment Alternatives

In this case, many of the key prerequisites for a solution would seem to be in place. First, all parties agree that the status quo is unacceptable from an environmental point of view, since the lagoons are leaking sewage into the aquifer. Secondly, funding is available; in fact the City of Ottawa has already spent millions of dollars on reports, consultations, an OMB hearing and legal proceedings, and the city has already committed a further $6.4 million towards the construction of a pipeline. Thirdly, the city seems to have a fairly clear incentive to resolve the problem, since each year of delay requires a further expenditure of $0.5 million to truck sewage from the lagoons to the city's central sewage treatment plant. Moreover, the technological challenges should not be too onerous, since the waste material is the residential sewage of 400-odd homes, and not a novel mix of persistent toxic pollutants. As well, the various parties to this issue have demonstrated an impressive level of technological expertise, zeal and persistence.

Unfortunately, a longer-term solution to this issue has been frustrated by lengthy, expensive disagreements and legal disputes among the interested parties. Each of the proposed treatment alternatives has strongly entrenched opponents and proponents, who have used legal options within the Class Environmental Assessment process, appeals to the OMB and other mechanisms to try to advance their cause. As described further on pages 52-59 of the annual report, a number of features of the Class Environmental Assessment process may contribute to the frustration of stakeholders.

The ECO has observed another recent instance where improvements to municipal wastewater treatment are caught up in a lengthy environmental assessment process, and where MOE's ability to insist on prompt environmental protection has been inhibited by the ongoing environmental assessment. In the 2002/2003 annual report, the ECO commented on the environmental assessment process for Ashbridges Bay Sewage Treatment Plant in Toronto: "MOE appears to be relying on the environmental assessment process to influence water quality improvements along Toronto's eastern waterfront. However, under this process, which is driven by the city, MOE has a limited ability to set the agenda and no ability to drive the timetable for environmental improvements. Although MOE could take a more assertive regulatory role by issuing orders requiring improvements to the Ashbridges Bay Sewage Treatment Plant and sewer systems, this approach does not appear to be favoured by the ministry."

In the 2002/2003 annual report, the ECO drew attention to the deteriorated state of Ontario's sewage treatment infrastructure. Upgrades are badly needed in hundreds of municipalities across the province. The primary barrier to resolving this problem is clearly financing, but it may be that shortcomings of the environmental assessment process can also act as barriers. Although the intent of the Municipal Class Environmental Assessment process was to streamline approvals, it may not be having that effect in practice, because property owners and local residents want to have an opportunity for a fair hearing on the proposed plan and its alternatives. Prior to the mid

1990s, the Minister of the Environment did on occasion order individual environmental assessments for certain contentious projects, involving more detailed studies, and in some rare cases, a hearing. Since 1995, only two EAs have been referred to the Environmental Review Tribunal. The ECO encourages MOE to monitor and evaluate how the Municipal Class EA is being applied by proponents, and suggests that the ministry consider the following questions:

- Does the Municipal Class EA provide adequate transparency, adequate traceability for planning decisions and adequate public consultation opportunities at all stages of the process?
- Does the ministry retain adequate oversight of the process?
- Does the ministry retain the ability to initiate mandatory abatement where necessary?

Review of Application I2002021: Alleged *EPA* and *OWRA* Contraventions by the Discharge of VOCs into Groundwater (Investigation Denied by MOE)

Background/Summary of Issues

In an application received by the ECO on March 7, 2003, the applicants alleged that 17 properties hydrogeologically up-gradient to property owned by one of the applicants in East York, Toronto are discharging contaminants into the soil and groundwater. The applicants also stated that the City of Toronto, as the legal successor to the former City of East York, operated or permitted the operation of at least three former dump sites in the immediate vicinity of the applicants property and that contaminants are being discharged from these sites. According to the applicants, the City of Toronto and the numerous persons or corporations which are or were owners and tenants of the up-gradient properties are in contravention of section 14(1) of the *Environmental Protection Act (EPA)* and section 30(1) of the *Ontario Water Resources Act (OWRA)*.

The applicants contended that the contaminated groundwater, which flows under the applicant's property, discharges into the Don River and ultimately, Lake Ontario. They provided letters from their consultant, who had reviewed groundwater studies of the area, in support of their claim. They expressed concern about the potential impacts of the contaminants which are released – particularly volatile organic compounds (VOCs), such as vinyl chlorides and other carcinogens – on human health, organisms and the environment. The applicants were also concerned that the contaminant discharges seriously impacted the ability of property owners down-gradient from the sources of pollution to sell and refinance their property, as pollution significantly degrades property value. The applicants indicated that they had recently attempted to both sell and refinance their property, but were unsuccessful.

The applicants claimed that the Ministry of the Environment (MOE) has had longstanding knowledge of these issues. They also asserted that the ministry has substantial information in its files regarding many of these properties, including information provided by the applicants. According to the applicants, the information MOE has is sufficient grounds for MOE not only to conduct an investigation, but to prosecute for contraventions of the *EPA* and *OWRA*.

Several weeks before the application for investigation was submitted to the ECO, the applicants' lawyer issued a request to the Director of MOE, Central Region for remedial and abatement orders to stop and remediate VOC discharges from the properties of concern.

Ministry Response

On May 12, 2003, MOE notified the applicants that it would not conduct an investigation under the *EBR* process as it was "continuing to conduct an ongoing investigation, apart from your application." The ministry welcomed input from the applicants, indicating that it would "be pleased to work with you and your consultants to obtain all necessary information and take steps to properly understand, and appropriately deal with, the volatile organic contamination in this area." The letter indicated that the applicants could contact the ministry should they have any questions and provided two points of contact.

ECO Comment

The ECO does not take issue with MOE's decision to deny an investigation under the *EBR*. According to Section 77(3) of the *EBR*, a minister is not required to duplicate an ongoing or completed investigation. The ECO also notes that MOE met all of the technical requirements of the *EBR* in handling this application.

However, MOE could have provided additional information about the ongoing investigation in their May 2003 letter to the applicants, as the ministry has done in other cases involving investigations already underway at the time of a request for investigation under the *EBR*. The ministry could have indicated whether its investigation would involve or constitute a review of existing studies and documentation. It could have indicated whether the investigation would entail any new studies or sampling and if so, what kinds and in what areas.

MOE also could have commented on why it does not believe that it possesses adequate information to begin to take steps to address the alleged VOC contamination, as alleged by the applicants. It might have indicated how any information collected would enhance information that had already been gathered by the applicants, MOE and other groups. Furthermore, MOE could have given the applicants a sense of the timeline for the ongoing investigation. The ministry informs applicants of anticipated completion dates and provides notice of the outcome of investigations when it conducts investigations under the *EBR*.

The ECO is aware, however, that MOE met with the applicants after their request for investigation and that some of this information may have been provided to the applicants in the course of these discussions.

In April 2004, MOE advised the ECO that its investigation had commenced in June 2002 (i.e., prior to the applicants request for remedial and abatement orders) and that it was still ongoing. The ministry indicated that it had reviewed studies and information about discharges from properties in the vicinity of the applicants' property to date. MOE also indicated that it was now planning to conduct a more comprehensive ground water study in the area, stating that the investigation would not be resolved within the next couple of months since contaminated site issues – especially those involving VOCs – tend not to get resolved quickly. MOE also advised the ECO that it had met individually with applicants and other property owners in the area earlier that month, to discuss its plans and other issues.

The ECO will continue to monitor the progress of this investigation.

Review of Application I2003001:
Alleged *EPA* Contravention during Snowmobile Trail Construction
(Investigation Denied by MOE)

Background/Summary of Issues

The applicants state that on September 11, 2002 a construction company used dynamite to level sections of an unopened road allowance adjacent to their property during the construction of a snowmobile trail. They allege that the noise and vibration from the blasting shook buildings and rattled windows in their frames.

The applicants allege that this blasting activity contravened s. 14 of the *Environmental Protection Act* (*EPA*) in that "no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect." For the purposes of the Act, a "contaminant" does include noise and vibrations. The *EPA* defines an "adverse effect" as one or more of:

- Impairment of the quality of the natural environment for any use that can be made of it
- Injury or damage to property or to plant or animal life
- Harm or material discomfort to any person
- An adverse effect on the health of any person
- Impairment of the safety of any person
- Rendering any property or plant or animal life unfit for human use
- Loss of enjoyment of normal use of property
- Interference with the normal conduct of business.

Prior to filing this application for investigation, the applicants had attempted to resolve their concerns by contacting the Town of Bracebridge, Natural Resources Canada, the Ministry of the Environment, the Ministry of Natural Resources, the Office of the Premier, and their local Member of Parliament and Member of Provincial Parliament.

The issue of the construction of snowmobile trails has been an ongoing issue of concern to the applicants. In 1995, the spouse of one of the applicants had filed an application for review under the *EBR* requesting that the Trans-Ontario Provincial Trails (TOP) snowmobile program administered by the Ministry of Culture, Tourism and Recreation be reviewed. The Ministry of Culture, Tourism and Recreation (as it then was configured) was not prescribed for reviews at the time of the application. Therefore, the ministry was neither compelled to acknowledge receipt of the application nor review the matters raised.

Ministry Response

MOE denied this application for investigation. The ministry stated that the applicants did not make any reference to adverse health effects or damage to property as a result of the blasting.

Further, MOE also stated that the *EPA* does not require any notification prior to blasting operations. Under their current system of dealing with such complaints, the ministry's reasons for denying the application appear valid.

MOE met the technical requirements of handling this application under the *EBR*. The ministry did not specifically refer to s. 78 of the *EBR* in its rationale. The decision to not conduct an investigation was made by the Director of MOE's Southwestern Region.

ECO Comment
The ECO believes that MOE could have provided more detail in its decision to deny the investigation. MOE did state that the application made no reference to health effects or damage to property as a result of the blasting. However, it is clear from the application that the applicants were alleging a loss of enjoyment of the normal use of their property. MOE should have addressed this concern to explain whether or not MOE considers a one-time occurrence of blasting to constitute an adverse effect in this regard. The ECO also believes that MOE should have explicitly stated that it is the ministry's position that this type of complaint is a municipal issue.

The past four ECO annual reports have contained discussions relating to the lack of enforcement of certain sections of the *EPA*, specifically the low priority MOE has placed on enforcing contraventions with regard to noise, odour, dust, and vibration. While noise, odour, dust and vibration are considered nuisances, exposure to high levels can interfere with the use and enjoyment of people's property.

In 1997, MOE developed its *Procedures for Responding to Pollution Incidents Reports*. The procedure was an attempt to allow MOE to better deliver its mandate by focussing on larger and more environmentally significant problems. The procedure was part of a larger ministry Delivery Strategy. Noise and vibration from blasting activities are listed as incidents that "require no further response" from MOE. If the ministry receives an incident report related to noise or vibration, the complainant is to be directed to call the local municipality, which has authority to enact noise control by-laws.

The *Municipal Act*, amended in January 2003, gives municipalities certain powers to prohibit and regulate noise, odour, dust, vibration and outdoor lighting. The *EPA* was concurrently amended to eliminate the need for MOE approval of municipal by-laws relating to noise and other nuisances. The policy direction and the recent amendments to the *EPA* point to the downloading of responsibilities for enforcement of contraventions for noise, odour, dust, and vibration to municipalities. The ECO has previously raised our concerns over the capacity of some smaller municipalities to take adequate action. Prior to filing the application for review, the applicants did contact their local municipality, but they allege that it never responded to their concerns.

The ECO does not have the mandate to review environmental decisions made by municipalities. However, this case illustrates the consequences of MOE's decision several years ago to step back from its *EPA* enforcement responsibilities relating to noise and vibration. While some municipalities may enact by-laws to control noise and similar nuisances, many others may opt to leave the issue unregulated at the local level. Enforcement of by-laws will also vary, depending on resources available. In effect, Ontario industries and residents are faced with the illusion of a provincial rule and an uncertain patchwork of local rules – a recipe for frustration and prolonged disputes. The legislative responsibility and accountability rests with MOE unless the *EPA* is otherwise amended.

Review of Application I2003002: Alleged *EAA* and *EPA* Contravention by MTO (Investigation Denied by MOE)

Background/Summary of Issues

This application raised concerns about local environmental impacts caused by the Highway 69 expansion undertaken by the Ministry of Transportation (MTO) and its contractor, Pioneer Construction Inc. The highway expansion project crossed the applicants' property in the Muskoka region. Highway 69 was not simply widened and expanded, but in some areas, such as the applicants' property, MTO selected a completely new route through land that had previously been undisturbed. However, the concerns of the applicants were not with the creation of the highway *per se*, but with the construction practices used, and their consequences. Before resorting to the *Environmental Bill of Rights* application for investigation process, the property owners had tried to get their problems resolved by complaining to the MTO and the Ministry of Environment (MOE). The key environmental issues include the obstruction of a natural water course by construction fill and resulting flooding of land, which killed a number of mature trees and allegedly contravened the *Environmental Assessment Act (EAA)* and the *Environmental Protection Act (EPA)*.

Although the highway construction work took place in 2000, the property owners did not become aware of the flooding problems until August of 2002, since they live far from the property. Having observed the problems, the property owners complained to MTO and to MOE. They also requested a copy of the relevant environmental assessment approval documents, but it appears MTO staff told them they would have to use the *Freedom of Information and Protection of Privacy Act* to access the documents.

MOE staff looked into the complaints, and were provided with the relevant environmental assessment documents by MTO staff. MOE staff decided that MTO's contractor was in non-compliance with a part of the environmental assessment approval that had been issued for the project. Specifically, an MTO report (required as a condition of the EA approval) committed MTO to the following: "excavated material, construction material, construction debris and empty containers will be stored or stockpiled away from watercourses or watercourse banks." MTO also committed that excess materials not useable for roadway construction would be managed in accordance with an Ontario Provincial Standard Specification which dictates that minimum separation distances for excess material is two metres above groundwater and 30 metres from waterbodies. Failure to comply with this commitment would be a contravention of the *EAA*.

MOE sent a letter advising MTO that the disposition of excess materials in the wetland area was not in compliance with the EA approval documents, and requesting an action plan. An on-site meeting was held in October 2002, involving MOE, MTO, MTO's contractor and the property owner. During the site meeting, it was agreed that MTO would provide MOE and the property owner with a written proposal to address the concerns. However, MTO did not submit a proposal, and instead went ahead with work in early November to widen a ditch and create an access berm, without the approval of MOE or the property owners. MTO merely advised MOE by letter that the work was completed, and that the flooding issue had been resolved. MTO provided photos of its work, and MOE relied on these photos to decide that the flooding issue had been resolved. MOE closed the file in November 2002, and forwarded the issue of non-compliance with environmental assessment approvals to the ministry's Investigations and Enforcement Branch.

The property owners did not agree that the flooding issue had been resolved by MTO. In their opinion, MTO's decision to pump out the flooded area was a temporary improvement at best, and the widening of the ditch, in their view, did not restore the natural water course or eliminate the flooding. The property owners submitted an *EBR* application for investigation in May 2003, attaching numerous photos of the flooded land, berms of fill, and dead trees. The application emphasized the obstruction of the natural water course flowing into Payne Lake, year-round flooding, extensive siltation, and also noted that the wrong type of culverts had been installed. It also noted that abundant tire, wood and cable debris had been mixed in with the aggregate fill. The ECO forwarded this application to MOE.

The applicants also alleged a contravention of the *Conservation Authorities Act (CAA)*. Although the Ministry of Natural Resources (MNR) is responsible for this Act, MNR takes the position that only Conservation Authorities have the legislated responsibility to implement section 28 regulations under the *CAA*. Therefore, the ECO forwarded the application to MNR for information purposes only. Under s. 28 of the *CAA*, Conservation Authorities may make regulations prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse, or for changing or interfering in any way with a wetland.

Background

This highway expansion project was the subject of an individual environmental assessment (EA) under the *Environmental Assessment Act*. The development of the EA involved considerable discussion and disagreement between the proponent (MTO) and MOE in 1995/1996. Among other things, MOE staff identified a number of data gaps and deficiencies in the EA, and saw a need for more detailed, site-specific information, and better discussion of anticipated impacts as well as the potential for mitigation. MTO resisted modifying the EA document. Eventually, the Minister of the Environment approved the EA in October of 1996, before detailed environmental studies had been carried out. However, terms and conditions attached to the EA approval required that the studies be carried out a minimum of 90 days before tendering. A key condition read, in part, as follows:

> The Ministry of Transportation shall prepare reports which deal with environmental information and impacts as they pertain to the construction of the undertaking and the operation of the facility. Where appropriate, baseline data on the current soil, air, water and sediment quality, especially for sensitive areas, shall be presented….Documentation shall,

where appropriate, include: drainage studies to accurately determine hydraulic parameters for culverts and structures and to protect against sediment transport; information on surface water quality to ensure protection of sensitive river crossings; …. An analysis shall be undertaken to address contaminant impacts, stormwater runoff, snow melt and any filling and diverting of watercourses. The reports shall be prepared and submitted to the satisfaction of the Director of the Ministry of Environment and Energy's Northern Region, a minimum of 90 days prior to tendering.

Ministry Response

MOE denied this request for investigation, stating that the alleged contravention of the *EAA* had already been investigated, but that the file had been closed because the six month statute of limitations had passed. MOE also explained that the ministry had decided not to investigate the contravention of S. 14 of the *EPA*, because the adverse effects were not serious enough.

To assess the question of flooding damage raised in the *EBR* application, MOE district staff undertook a second site visit in June 2003, and produced an internal memo stating that: "There were trees killed by the recent flooding, but this should be pursued civilly by [the applicant]. Although it seems obvious the trees died from the flooding, one would have to prove this. Pursuing MTO for killing 15-20 mature trees possibly killed during a construction project is not a priority." The MOE staff Occurrence Report following the October 2002 site visit had used similar blunt language, stating that "Contractor has flooded property, killing a large number of trees."

However, according to MOE's corporate response which was sent to the applicants, the abatement actions taken by MTO "had created water flow and that there was no flooding." The same official decision summary also noted "that there are a minimal number of new dead trees. As well, a number of the trees appear to have been dead for some time."

MOE's June 2003 site visit also revealed that there were still aggregate berms deposited on a wetland area, running parallel to the highway, and that this practice was not isolated to the one property in question. MOE observed this practice along the highway project in several locations.

MOE's decision summary noted that while 20-30 tire scraps were observed on the site, these probably originated from tire blasting mats used during blasting operations in the area, and the quantity of tires was too small to warrant abatement action. Prosecution would also be difficult, since it would be hard to determine the origin of tires.

MOE's July 2003 decision summary was somewhat short on detail, and prompted further questions and concerns from the applicants. MOE then followed up in October 2003 with a more helpful detailed letter to the applicants, and attached a number of relevant background documents and internal memos. MOE's October letter explained that MOE was considering ordering MTO to self-audit its environmental compliance during construction of the entire Highway 69 extension. The same letter also noted that the applicants had the right to submit a further application under the *EBR*, and could also sue for harm to a public resource. As well, MOE noted that damage to private property could be addressed through the civil courts.

The application was also sent to MNR for information purposes only, since MNR takes the position that only Conservation Authorities have the legislated responsibility to implement section 28 regulations under the *Conservation Authorities Act*. Since there is no local Conservation Authority in the Parry Sound area, there are also no regulations under the *CAA* setting out rules for interfering with watercourses or wetlands in the Parry Sound Area. Thus, MNR was not required to acknowledge receipt of this application, and did not do so.

MNR was, however, involved in discussions with MTO at several stages of the Environmental Assessment for this project; as part of the Route Planning Study in 1992 and later in the detail design phase in 1998. MNR's input related to a number of issues, including fish habitat, wetlands, and wildlife. Based on MNR's advice in 1992, it was concluded that fish habitat impacts would only be of concern at one location along the project; the Blackstone River crossing, and thus special construction details were negotiated for this location.

For watercourses along the project, MTO's 1999 Environmental Summary Report detailed numerous Contract Provisions that were to be followed, including the following:

- "watercourses shall not be diverted or blocked and temporary watercourse crossings shall not be constructed or utilized unless otherwise specified in the Contract"
- "construction material, excess material, construction debris and empty containers shall be stored or stockpiled away from watercourses and watercourse banks to prevent the erosion and/or deposition of this material into open water areas."
- "excavated material is situated in such a manner and location to prevent the erosion and/or deposition of this material into wetlands or open water areas or onto private property"
- "run-off from construction materials and any stockpiles shall be contained and discharged so as to prevent entry of sediment to watercourses"

It appears that these clear provisions also were not followed in this case.

ECO Comment

In evaluating the outcome of this *EBR* application, it is useful to consider MOE's involvement at three separate phases of the story:

- Prior to any complaints from the property owners
- Following the August 2002 complaints from the property owners
- Following the submission of the *EBR* application

The following discussion will begin by addressing phases 2 and 3, since these relate most closely to the *EBR* application. For the most part, MOE appears to have done a fairly good job on the second phase, i.e., responding to the initial complaints from the property owners. MOE took a number of appropriate steps; requesting documentation from the proponent (MTO); deciding that there appeared to be non-compliance; asking the proponent to respond, and organizing a site meeting involving all parties. MOE also asked the proponent for a written proposal to solve the problem, although the proponent did not comply with this request. Unfortunately, when MTO submitted photos to demonstrate the work that had been done, MOE relied on the photos. This was a flaw: the ECO believes it would have been more appropriate for MOE to follow up with an on-site inspection shortly after MTO's work, to judge if the flooding problems were resolved, especially since the proponent had failed to provide a written proposal first.

In response to the third phase, MOE denied the request for an investigation under the *EBR*, and cited several valid reasons for doing so. The contravention under the *EAA* could not be pursued because the six month statute of limitations under the EAA had expired, and the alleged contravention under the *EPA* was not considered serious enough for MOE to prosecute. In doing so, MOE appears to have assumed that the damage was caused in 2000 when the construction took place and that there was no ongoing contravention of the *EAA*. MOE also took a number of appropriate steps while responding to the *EBR* application for investigation. MOE undertook a site visit in June 2003 to evaluate the flooding and the damage to trees, and provided the applicants with a brief but reasonable description of earlier actions on the file. Most significantly, MOE staff observed that there was a more widespread problem with construction practices, considered solutions, and formulated an internal plan to order MTO to self-audit its environmental compliance during construction of the entire Highway 400 extension.
MOE shared this idea of a self-audit with the applicants in a follow-up letter, after persistent inquiries. MOE's follow-up letter also explained that the applicants had the right to submit a further application under the *EBR*, and could also sue for harm to a public resource. As well, MOE noted that damage to private property could be addressed through the civil courts.

Having uncovered concerns with construction practices, MOE took firm and, in the ECO's view, appropriate action. MOE staff began to draft a Provincial Officer's Order requiring MTO to carry out an environmental compliance audit on the completed portion of the Highway 69 expansion project. MOE issued this Provincial Officer's Order to MTO on May 11, 2004, and also provided a copy to the applicants. A key requirement of the order is that MTO must hire a consultant to report on the construction practices and mitigation measures used in the Highway 69 project, and compare them to the procedures outlined in the EA approval documents, including a review of erosion control, diversion of watercourses, drainage studies, as well as handling and placement of excess materials. Among other things, the Provincial Officer's Order requires MTO to adhere to the terms and conditions of the EA approval documents on any remaining portions of the undertaking. By January 2005, MTO must submit a final report to MOE outlining the results of the audit, and recommendations on how to improve issues identified for this and future MTO road construction and maintenance projects.

While the Provincial Officer's Order should help to resolve the concerns about construction practices raised by this application, there are several additional issues deserving attention.

The ECO does have a concern with MOE's assessment and description of the extent of damage to trees. MOE's corporate response to the applicants through the official decision summary appeared to downplay the significance, extent and cause of tree death on the property, using language that did not reflect the more strongly worded internal memos of MOE field staff on this point, which noted: "Although it seems obvious the trees died from the flooding, one would have to prove this." It would have been more appropriate for MOE to reflect staff observations on-site, and then use its discretion to determine that the contravention of s. 14 under the *EPA* was not serious enough to warrant an investigation.

It also appears that MOE did not go back to check what the EA approval documents required from MTO with regard to protection from flooding around trees. In fact, MTO had committed to the following: "To the extent feasible, the existing drainage regime within the upland forest areas will be maintained. Ditch design and outlet points have been designed such that long-term ponding of water will not occur in upland forest areas."

MOE responded to most but not all of the valid concerns raised in the application. MOE's decision summary did not discuss whether the correct type of culverts had been installed. The applicants asserted that equalization culverts had been installed, and that drainage culverts would have been the correct engineering approach. This could have led to the flooding observed. To check this point, MOE should have requested and reviewed the approval documents from MTO. This is especially relevant since MTO committed in its 1999 Environmental Summary Report (required under the EA approval) that in wetland areas, "the existing drainage regime will be maintained for all wetland areas. Culverts have been provided at wetland edges and where the highway bisects a wetland to ensure that water can continue to flow within the wetland area." The same report also listed culvert locations and design. In the event that the wrong culverts were installed, MOE could have required abatement action from MTO or the contractor.

The ECO has serious concerns regarding MOE's role during the first phase of this story, i.e., before the initial complaint. Although MOE staff at the Environmental Assessment Branch had identified numerous deficiencies in the EA for this highway project, it appears their involvement ended after the EA approval was issued in 1996. EA monitoring is not assigned to MOE district staff, so there was no mechanism to check MTO's compliance with the terms and conditions of the approval. For example, according to a condition of EA approval, MOE's Northern Region Director was supposed to be satisfied with reports provided by MTO prior to construction contracts being tendered. Reports were to include baseline data on current soil, air, water and sediment quality, especially for sensitive areas. However, MOE can find no records to confirm whether MOE staff reviewed these reports or found them to be satisfactory. Also, in the absence of a complaint from the public, it seems that MOE has no mechanism to audit compliance with conditions of EA approvals.

Furthermore, MOE could follow up on a complaint and investigate or prosecute only if the complaint was received within six months of the alleged contravention. But members of the public can complain only if they can recognize evidence of non-compliance, and in many cases they need the EA approval documents to do this. In this instance, the complainants asked MTO for the EA approval documents, but allege they were forced to use the Freedom of Information process, which apparently took a year. These multiple constraints effectively thwarted the efforts of the applicants to have MOE enforce the *Environmental Assessment Act*.

The ECO saw no evidence that MOE investigated the allegation of the applicants that they had to resort to Freedom of Information legislation to acquire the Environmental Assessment approval documents from MTO. Environmental assessment documents are intended to be available to the public, and it is clearly inappropriate to deny access to them. MOE should have looked into this. Moreover, the ECO reminds MTO of its responsibility and stated commitments to transparent public consultation. MTO may need to review its practices in this regard, to ensure that this type of incident is not repeated.

This application illustrates very starkly how difficult it can be for members of the public to gain access to highway construction related approval documents, permits or background scientific reports, or to learn what approval documents might exist – even for strongly motivated individuals with high levels of education, who are supported by legal advice. At various times, the applicants asked MOE for copies of several approval documents. But it seems that MOE had neither access to nor knowledge of the relevant documents. This is a serious concern, since MOE is required by law to maintain a record of EA approval documents, and to make these documents available to the public upon request.

It is unclear why the applicants did not undertake a civil action against MTO and the contractor. Cost may have been a deterrent.

Over the years, the ECO has received other applications with concerns about MTO's highway planning processes and construction practices. For example, in 1997, applicants described a long-standing erosion problem on private property, caused by construction of Highway 401. At the time, the ECO noted that "The ministries involved are urged to ensure that gaps and overlaps in jurisdiction over watershed management matters do not become a basis for allowing these types of problems to continue unaddressed for many years." Unfortunately, Ontario residents with environmental concerns about MTO's highway construction policies and practices have rather limited opportunities to apply the normal *EBR* tools, because MTO is not prescribed for reviews under the *EBR*. This means that it is not possible to submit an *EBR* application requesting that MTO review its environmental policies and practices for highway construction. However, the ECO is hopeful that MOE's issuance of a Provincial Officer's Order will trigger a healthy discussion between the two ministries with regard to highway construction policies and practices, and that this discussion will ultimately lead to on-the-ground improvements.

In April 2004, MTO posted a proposal on the Registry for "Environmental Protection Requirements for Transportation Planning and Highway Design, Construction, Operation and Maintenance" (PE04E4551). The ministry explained that it recognized a need to develop a consistent, systematic approval to environmental management by improving how MTO assesses environmental risk and controls the environmental impacts resulting from its activities. The ministry is proceeding with an Environmental Standards Project as a first step, and has outlined a plan for posting notices on the Environmental Registry (XE02E4550). The ECO will monitor MTO's progress on these postings.

Overall, this application illustrates a number of systemic weaknesses in the EA process. It suggests that MOE does not have the resources to properly monitor the large number of approvals it issues under the *EAA;* that MOE continues to rely on a complaint-based compliance model; and that MOE is reluctant to prosecute proponents for failures to comply with terms of approvals under the *EAA*. The ECO urges MOE to address the following weaknesses:

- The unrealistically short six month statute of limitations under the *Environmental Assessment Act*, which makes it very difficult for the public to use the *EBR* to get MOE to investigate and then prosecute
- The difficulties faced by members of the public when trying to access relevant detailed environmental assessment approval documents
- The inadequacies or even absence of compliance monitoring by MOE regarding the detailed terms and conditions of environmental assessment approvals.

Review of Application I2003003:
Alleged *EAA* Contravention / Red Hill Creek Expressway
(Investigation Denied by MOE)

Background/Summary of Issues

In May 2003, the applicants alleged that the City of Hamilton ("the proponent") had committed an offence under the *Environmental Assessment Act* (*EAA*) by failing to comply with certain terms and conditions of Order in Council 582/97 ("the declaration order"). According to the applicants, the declaration order set up legal requirements for assessment, monitoring, public consultation and public reporting that the proponent allegedly did not implement adequately or at all.

There is a long and complex history to this application that was set out in the applicants' submission and is summarized in brief here. Discussion of the expressway proposal began as early as October 1956, and a route, consisting of an east-west road and a north-south road, was selected in 1979. After a 1985 Joint Board decision, the east-west portion of the undertaking was completed and is now known as the Lincoln Alexander Parkway. In 1990, the provincial government cancelled funding for the north-south portion of the undertaking due to environmental concerns. In 1996, the Regional Municipality of Hamilton-Wentworth made a submission to the Minister of Environment and Energy requesting an exemption order (declaration orders were known as exemption orders until the *EAA* was reformed in 1996) for the north-south portion of the undertaking, and proposed changes to the expressway. (Following municipal amalgamation in 2001, the City of Hamilton became the proponent of the project.)

On March 5, 1997, the provincial Cabinet approved the declaration order, declaring that section 5 of the *EAA* (requiring ministerial approval for an undertaking under the *EAA*) did not apply to the undertaking and that it was approved subject to the conditions in the order. The order incorporated the proponent's 1996 submission, which in turn incorporated the 1985 Joint Board decision and 1987 Order in Council that had varied the Joint Board decision. The declaration order was made subject to the following three conditions:

- The proponent was required to satisfy the conditions of the original 1985 Joint Board decision as confirmed by Cabinet in 1987 except as they were specifically modified or superseded by or pursuant to the declaration order.
- The proponent was required to carry out the planning and implementation for its project in accordance with its submission dated May 6, 1996, and its letter of November 19, 1996, to the ministry addressing matters raised by the Niagara Escarpment Commisison.
- Construction of the interchange with the Queen Elizabeth Way was only authorized if the Regional Municipality of Hamilton-Wentworth was implementing the Niagara Escarpment crossing as set out in the exemption order submission so as to ensure that the final alignment was an improvement over the 1985 approved Niagara Escarpment Crossing.

The applicants submitted that the proponent's failure to comply with the declaration order risks serious damage to Red Hill Creek ecosystem, including harm to endangered wildlife and sensitive wildlands, and will contribute to air pollution and threaten human health. A number of issues related to the proponent's alleged contravention of the order are set out below.

In relation to assessment and monitoring, the applicants stated that, in its 1996 submission, the proponent committed itself to conducting an assessment of the condition of the environment as it existed prior to construction, both considering watershed-level impacts and assessing data for specific sites in the undertaking. The applicants quoted from the proponent's 1996 submission where the City proposed that the Project Team would consult with government agencies, interest groups and the public in evaluating proposed changes, and developing evaluation categories, factors and indicators that reflect significant environmental features. The applicants stated that the proponent committed in its 1996 submission to MOE that assessment and monitoring were to occur prior to project implementation.

The applicants alleged that the proponent did not meet its obligation for a number of reasons including the following: reports have not been released for public review, even months or years after completion; and pre-construction monitoring has not been conducted as proposed, or at all.

With respect to public consultation, the applicants noted that the proponent committed in its 1996 submission to a stakeholder consultation program to develop an expressway design that would minimize environmental impacts, in the form of a Community Stakeholder Committee (CSC). The applicants submitted that consultation, and in particular the CSC, were intended to be an integral part of the assessment process. Two of the applicants were members of the CSC, which participated in three public meetings organized by the proponent in early 1998. The main concerns raised by public participants were the need for, alternatives to and cost of the expressway project, matters excluded from the terms of reference of the CSC. The CSC formulated a resolution informing the proponent of these concerns and asking it to consider changing the terms of reference. The applicants allege that the resolution was not permitted to reach Regional Council and, in response, a number of members resigned from the CSC, although they continued to participate as public members. The CSC was disbanded in September 1998.

The applicants alleged that the Assessment Process Schedule set out in the proponent's 1996 submission included consultation elements that have not been followed. Specifically, the applicants alleged that two elements of the consultation program set out in the 1996 submission have been ignored or abandoned: the Landowners Committee (LC) was never formed; and the Government Agency Committee (GAC) was formed but never met. The applicants stated that the proponent does not intend to consult further with the public, and attributes the interruption of stakeholder consultation to the federal government's unsuccessful attempt to refer the undertaking to a review panel under the *Canadian Environmental Assessment Act* in 1999.

The applicants noted a long list of reports relating to environmental impacts that the proponent was required to produce as part of the Impact Assessment Process described in its 1996 submission. The applicants stated that some of these reports were to be produced in order to obtain required approvals, and that they must be made available to the public. A number of draft reports were released in 1997 and in August 1998 when the proponent requested written comments on the reports. A number of groups and individuals responded in October 1999. While the proponent committed to providing written responses by January 1999, at least one group had received no response as of the time of this application. Some further draft reports were released in 2002.

The applicants alleged that the proponent's failure to comply with public consultation requirements in the declaration order has denied the public's right be involved in decision-making about the undertaking. The applicants stated that there is a need for public consultation on the reports and for greater transparency.

The proponent's 1996 submission identified statutory approvals and permits that might apply to the undertaking. The applicants asserted that relevant permits and approvals include: a development permit under the *Niagara Escarpment Planning and Development Act* (*NEPDA*); a permit under the *Conservation Authorities Act* for construction in certain areas of Hamilton, including the Red Hill Creek Valley; a permit for working within a water course under the *Lakes and Rivers Improvement Act*; approvals under the *Ontario Water Resources Act* and the *Environmental Protection Act*; and an authorization under the federal *Fisheries Act*.

The applicants alleged that a number of these permits have not been obtained, and that in some cases the proponent had not even made an application as of May 2003. In the case of the *NEPDA* permit, the applicants alleged that the proponent is relying on a development permit issued in 1987 when the proposed undertaking was different. The applicants submitted that, even if a permit under the *NEPDA* was issued in 1987, the results of the assessment process and potentially significant design changes require that the Niagara Escarpment Commission consider the undertaking as it is now proposed.

The proponent's 1996 submission stated that a Detailed Design and Construction Monitoring stage would follow the Impact Assessment stage and would require a Design Report that would form the basis for all permits and approvals required from various agencies prior to the commencement of construction.

The applicants alleged that the proponent was stating publicly in the spring of 2003 that it was ready to proceed with construction imminently, and that the proposed work appears to involve significant components of the undertaking for which Assessment and Monitoring, Public Consultation, Reports and Permits and Approvals described in the application had not been completed.

In summary, the applicants alleged that because the declaration order declared that the undertaking was exempt only from s. 5 of the *EAA* and not the entire Act, the proponent had contravened s. 38 of the Act which provides that every person failing to comply with an order or term or condition of an approval issued under the *EAA* commits an offence under the Act. The applicants submitted that one of the reasons given by the Minister of the Environment for issuing the declaration order was that the proponent had agreed to implement an assessment process to allow government agencies, community groups and the public to exchange ideas and information, clarify positions and expectations, and work together to develop an expressway design that would reduce impacts to the Red Hill Creek watershed. The applicants alleged that the stakeholder input process had not been followed. The applicants argued that the proponent cannot rely on the federal government's attempt to refer the undertaking to environmental assessment by review panel as an excuse for the failure to consult with the public between October 1998 and October 2002.

The applicants noted that compliance with the declaration order is important due to the location of the expressway construction: its serious impact on two sensitive marshes; and its close proximity to a landfill site that had served the region in the past. This former landfill site is significant as it was found to be leaching persistent contaminants, such as PCBs and pesticides, into Red Hill Creek. The city plans to excavate waste from the former landfill site in order to construct the expressway. The applicants alleged that, without a timely determination of whether or not the proponent has complied with the order to date, irreversible environmental damage is likely to result because the proponent was prepared to proceed in the summer of 2003 with major stages of construction of the undertaking.

Ministry Response

MOE concluded that it was not in the public interest to conduct an investigation, despite acknowledging that there were many problems with the proponent's compliance with the declaration order.

In response to the applicants' allegation that pre-construction monitoring had not been conducted as proposed, and the applicants' examples of a large number of reports as well as pre-construction air quality monitoring, MOE stated that the proponent had released a number of draft and final reports and indicated that additional reports were being developed. MOE noted that the proponent's 1996 submission stated that air quality monitoring would be done one year prior to construction, one year during construction and two years after construction. In April 2003, the proponent released a report called "Pre-Construction Ambient Air Quality Monitoring" that stated that ambient air quality monitoring had been completed in June 1998, one year prior to the anticipated start of construction. MOE stated that the survey duration and sampling protocol were discussed with and agreed to by MOE and MOE conducted an independent audit. Therefore, MOE stated that it would not be investigating this alleged contravention further.

MOE responded to the applicants' allegations of problems with the public consultation process, including disbanding of the CSC, by identifying statements in the Assessment Process Schedule that "arguably" provide the proponent with some flexibility in satisfying the intent of the stakeholder consultation program while responding to changes in the public environment. MOE provided a description of events, stating that after several members of the CSC resigned, the CSC attempted to recruit new members and then unanimously resolved that its work was complete and disbanded in September 1998. MOE noted that the proponent released a Public Consultation Report in March 2003, highlighting the work of the CSC, and that the proponent has indicated that it will implement a community relations program during the pre-construction, construction, monitoring and maintenance phases of the project. MOE stated that it would follow up with the proponent to determine whether this proposed community relations program satisfies the requirements of the declaration order. However, MOE declined to investigate this alleged contravention further, stating that it took place in 1998 and was therefore beyond the six-month limitation period in the *Provincial Offences Act* (*POA*).

In response to the applicants' allegation that the LC was never formed and the GAC was formed but never met, MOE repeated that the proponent's 1996 submission provided flexibility in satisfying the intent of the stakeholder consultation program while responding to changes in the public environment. MOE acknowledged that the proponent never formed a LC, which was satisfying the intent of the stakeholder consultation program while responding to changes in the public environment. MOE acknowledged that the proponent never formed a LC, which was intended to provide key input into the economic impact assessment, but noted that the proponent produced a March 2003 report entitled "Economic Impact to Businesses at QEW Interchange," that provided an assessment of economic impacts based on landowner input. MOE offered this as an example of the proponent meeting the intent of the commitments in its 1996 submission.

With respect to the GAC, MOE noted that the proponent did initiate this committee, but agreed that the requirement of the proponent to satisfy the mandated responsibilities of the government agencies remained outstanding. While MOE conceded that the failure of the proponent to create the LC and to have the GAC meet might be seen as a potential non-compliance issue, it expressed doubt as to whether this could be successfully prosecuted given the wording of the proponent's 1996 submission. Therefore, MOE decided not to investigate further, relying on ss. 77(2)(b) of the *EBR*, which provides that an alleged contravention may not be serious enough to warrant an investigation. However, MOE undertook to follow up with the proponent to determine how it had satisfied the mandate of the LC and GAC.

MOE found that there was no contravention with respect to the applicants' allegation that responses to stakeholder comment had not yet been received. MOE stated that this requirement was satisfied by the proponent's March 2003 Public Consultation Report that included issues raised and the proponent's response. Also, because the declaration order did not specify that proponent must consult on final technical reports issued for the project, MOE did not investigate the applicants' allegation that the proponent had released final reports "for information" with no further consultation. In response to the applicants' suggestion that changes in the environment and in the proposed undertaking required further consultation, MOE pointed to the March 2003 report and the planned community relations program as evidence that the proponent was taking into consideration the current environment and proposed undertaking, so that there was no need for further investigation.

MOE declined to investigate further in relation to other allegations relating to reports. Although the applicants alleged that the Design Report had not been completed even though it was required for approvals prior to construction. MOE decided not to investigate because the proponent intends to complete the report as part of the Detailed Design, Construction and Monitoring Stage, and there was no time requirement for the completion of this report. In response to the applicants' allegation that the proponent had not completed the Impact Assessment Report, MOE noted that the proponent had issued an executive summary in April 2003 of the forthcoming Impact Assessment Summary Report, and said there would be no further investigation because there was no time requirement to complete the report. MOE stated that it would monitor the proponent on the development of both of these reports.

With respect to allegations by the applicants that the necessary permits and approvals had not been obtained, MOE again decided not to investigate any of the allegations further because time requirements were not specified in the conditions in the declaration order. MOE did commit to consulting with the Niagara Escarpment Commission to determine whether the permit it had issued fulfilled the conditions of the declaration order. In relation to the *Conservation Authorities Act*, MOE stated that that the proponent had taken initial steps to obtain the required approvals or authorizations. MOE also reported that the proponent was working with MOE to obtain required ministry approvals.

MOE concluded that the majority of the alleged contraventions raised by the applicants did not warrant further investigation. However, MOE stated that it takes compliance issues seriously and would continue to monitor a number of matters related to the proponent's compliance with the declaration order.

ECO Comment

The Red Hill Creek Expressway is a large, environmentally significant project that has been extremely controversial over many years in the Hamilton region. The proposed expressway will be built in an environmentally sensitive area, through wetlands and close to a former landfill site. The declaration order exempting the proponent from approval under the *EAA* incorporated extensive commitments by the proponent with respect to consultation, monitoring, reporting, and obtaining permits and approvals. The language in the 1996 submission that was incorporated by the declaration order was detailed and specific in setting out the proposed impact assessment process. The 1996 submission stated that the "goal of the consultation program is to ensure that all stakeholders are able to provide input to the project in a meaningful and resource (money, time and energy) efficient way," and went on to give specific details of the teams and committees that would be formed and engaged, including a Project Team, the CSC, the LC, and the GAC.

In denying the applicants' request for an investigation, MOE consistently took the position that the proponent had complied with the "spirit" if not the letter of its commitments in its 1996 submission. However, the applicants presented numerous examples of specific consultation commitments that were not met: the Community Stakeholder Committee disbanding; the Landowner Committee not being formed; the Government Agency Committee not meeting. The examples MOE offered as alternative consultation meeting the spirit of the proponent's 1996 submission lacked credibility and did not seem like adequate replacements. This may have resulted in a less preferable environmental design. The language in the declaration order was very clear that proponent was to comply with the commitments it had made: "[t]he Proponent *shall* carry out the planning and implementation for their project *in accordance with* their submission dated May 6, 1996…" (italics added).

As noted above, MOE declined to further investigate the alleged contravention in relation to the disbanding of the CSC, stating that it took place in 1998 and was therefore beyond the limitation period in the *POA*. However, the commitment in the 1996 submission was that the CSC would provide input into the assessment process to determine a final design for the expressway, a process that was still faltering, in the eyes of the applicants, at the time this application was made. Therefore, the alleged contravention was still occurring and not subject to the limitation period in the *POA*.

With respect to a number of other allegations, MOE decided not to investigate stating that there were no time requirements specified for completing reports or obtaining approvals. However, the 1996 submission and the declaration order clearly indicated that these requirements would be completed prior to finalizing the design and beginning construction on the expressway. The applicants alleged that some construction had already begun in the spring of 2003 and MOE did not respond to this allegation. This is surprising given the seriousness and potential environmental significance of this allegation.

Although MOE did acknowledge numerous ways in which the proponent had failed to comply with commitments incorporated into the declaration order, it appeared reluctant to take any action to ensure the proponent's compliance with the order.

Under ss. 77(2) of the *EBR*, a minister may decide not to conduct an investigation where an alleged contravention is not considered serious enough to warrant an investigation. MOE referred to this subsection to justify its decision not to investigate the proponent's failure to create the LC and have the GAC meet, and expressed doubt as to whether this alleged contravention could be successfully prosecuted given the flexible wording of the proponent's 1996 submission. The ECO questions the ministry's invocation of ss. 77(2)(b) in these circumstances. The wording of the city's 1996 submission was clear about the establishment and engagement of the stakeholder committees. The city's failure to do so appears to constitute a significant contravention of the declaration order.

The ministry responded to nearly all of the applicants' specific concerns. However, MOE sometimes responded in a selective manner. For example, while the applicants noted a large number of pre-construction monitoring reports that had allegedly not been adequately prepared and shared with the public, MOE responded by addressing the proponent's handling of only one of them. The ministry did explain its reasons in plain language, but answered the various allegations quite briefly with insufficient detail. For example, little detail was given on the alternate ways in which MOE believed the proponent was complying with the "flexible" language of its 1996 submission. Overall, the ministry response was relatively brief given the detail in the application.

MOE committed to a few follow-up actions in relation to some allegations that it had declined to investigate further, such as monitoring certain aspects of the proponent's compliance with the declaration order and contacting the Niagara Escarpment Commission (NEC). MOE did contact NEC in the summer of 2003 and confirmed that the permit was valid. NEC is continuing to review technical reports prepared by the city as a result of the declaration order. The ministry did not suggest reasonable alternative mechanisms to resolve the applicants' issues.

The ministry met all technical requirements of the *EBR* in handling this application. The ECO received the application on May 8, 2003 and referred it to MOE on May 13, 2003. MOE sent a letter acknowledging receipt of the application on May 15, 2003, well within the 20-day deadline required by the *EBR*. MOE wrote to the applicants on July 11, 2003 within the 60-day timeframe for informing them that it would not be conducting an investigation.

The decision not to investigate was made by the Environmental Assessment and Approvals Branch, which is responsible for approving decisions under, and ensuring compliance with, the *EAA*. This branch had previous involvement in the decision. It should also be noted that the city of Hamilton withheld certain environmental assessment reports. In response to a request by media organizations under the *Municipal Freedom of Information and Protection of Privacy Act*, the city claimed solicitor-client privilege in order to keep reports related to the Red Hill Creek Southern Flying Squirrel Population Study confidential. In June 2003, Ontario's Information and Privacy Commissioner released a decision stating that the city was required to release these reports because they were prepared for the purpose of meeting the requirements of the declaration order. The city has now released the reports.

This application highlights the fact that MOE is not prepared to vigorously enforce requirements that flow out of the *EAA* process.

Review of Application I2003004: Alleged *Pesticides Act* Contraventions by a Computer Parts Importer

(Investigation Denied by MOE)

Background/Summary of Issues

In May 2003 two Ottawa residents filed an application for investigation alleging that s. 28(1) and s. 30(1) of the *Pesticides Act* were contravened in May 2001 by Alcatel Canada, a Kanata-based company that imports goods and computer parts into Canada from Hong Kong. The applicants believe that the alleged contraventions took place when a pesticide called Dinex (2-cyclohexyl-4,6-dinitrophenol, $C_{12}H_{14}N_2O_5$) was inadvertently released, in a yellow, crystalline powder form, at the corporate head office of Alcatel on May 18, 2001. The applicants alleged that Alcatel failed to prevent the incident and failed to take appropriate action to properly remove the pesticide from the plant, in contravention of the *Pesticides Act*. The applicants also alleged that materials and goods covered with residues of the pesticide allegedly were left exposed, in the workplace, for approximately three weeks after the incident.

Section 28(1) under the *Pesticides Act* empowers the Ministry of Environment (MOE) to issue a director's order to the person responsible for a product or thing if it causes or is likely to cause injury or damage to property or to plant or animal life. Under s. 30(1) an MOE Director, where he or she is of the opinion that it is in the public interest to do so, may order the person responsible for the pesticide or the substance or thing containing the pesticide to take steps within a certain time to prevent injury or damage, restore environmental quality or decontaminate the environment.

One of the applicants was on a temporary assignment at Alcatel when he was accidentally exposed to the pesticide. At the time, he was cutting open wooden-skidded cardboard containers, which were wrapped in thick plastic film, and, in the process, he released the pesticide. Workers doing this activity were not required by the company to wear special protective clothing or equipment at the time of the incident, and the packaging was not labelled in an appropriate manner, thus making it impossible for workers to know the risk that this activity posed. The injured applicant was hospitalized and treated for exposure to the pesticide after the incident and claimed he had been unable to work since May 2001. Lab tests undertaken by the employer verified that the released powder was the Dinex pesticide.

The applicants further alleged that Dinex, a dinitrophenol acaricide used to control insects, is very dangerous, and noted that its approval for use in Canada was revoked by the federal government in 1982. Moreover, the application noted that one of the applicants was informed by a supervisor that the Dinex pesticide had been used by a Hong Kong-based exporter to prevent transport of the Asian Long-Horned Beetle, (*Anoplophora glabripennis)*, an invasive alien species, into Canada in the wooden-skidded cardboard containers.

Ministry Response

In July 2003 MOE wrote to the applicants, stating it would not be conducting an investigation of the alleged contraventions as there were no outstanding issues under the *Pesticides Act* or the *Environmental Protection Act (EPA)*. MOE reviewed whether an alleged contravention of the *EPA* provisions on waste handling might have taken place when the pesticide was spilled even though the applicants did not allege that the *EPA* had been contravened by the goods importer.

The MOE noted in its response that the original application of the spilled Dinex took place in Hong Kong, and was not regulated by MOE and would not be subject to the *Pesticides Act*. MOE also stated that the Ministry of Labour (MOL) had conducted an investigation of this incident under the *Occupational Health and Safety Act* after MOL was contacted in late May 2001. The MOL investigation confirmed that the spilled pesticide had been cleaned up and the residual waste was disposed of by a licenced waste management firm. In addition, the injured applicant/former employee was advised by MOL to contact the Pest Management Regulatory Authority (PMRA), a federal agency based in Ottawa, regarding his concerns about the use of Dinex in the packaging imported by Alcatel.

MOE also noted that prosecutions for any offence under the *Pesticides Act* must be launched within two years after the date of the alleged incident and that, since the alleged contraventions took place in May 2001, the limitation period had been exceeded.

The ECO contacted the PMRA, an agency of Health Canada, in May 2004 to follow-up on contact between one of the applicants and the agency in 2001, as recommended by MOL. We were advised that the PMRA had decided not to investigate this spill, and staff did not believe that this was a matter regulated by the PMRA under the *PCPA*. Staff at the PMRA also told the injured applicant/former employee that he could pursue other mechanisms such as a civil action in the courts. The PMRA also advised the ECO that in 1964 Dinex ceased to be an active ingredient in any pest control product registered with either the federal government or the PMRA. The ECO was unable to confirm that the PMRA subsequently revoked approval for application of Dinex by Ontario applicators (and those in other provinces) in 1982.

ECO Comment

The use of pesticides may potentially result in significant health and environmental impacts. In Canada, pesticides are regulated by both the federal and provincial governments. All pesticides imported into, sold or used in Canada are regulated by the federal government under the *Pest Control Products Act* (*PCPA*). Under section 5 of the *PCPA*, no person shall import into Canada any controlled product unless the product has been registered as prescribed and is packaged and labelled appropriately. As noted above, the federal authority with responsibility for reviewing and approving pesticides for use in Canada is the PMRA. The federal authority responsible for inspecting packaging materials at the point of entry and making sure that they are free of invasive alien species is the Canadian Food Inspection Agency (CFIA).

Under the *Pesticides Act*, MOE is responsible for regulating the sale, use, storage, display, transportation and disposal of pesticides. The six categories used for pesticide classification by Ontario Pesticides Advisory Committee (OPAC) and MOE are based upon the toxicity of the pesticide, the hazard they pose to the environment, environmental persistence, and how they will be used. Different rules apply to the use of pesticides depending upon which category they fall into. When MOE makes a decision on the categorization of new pesticides or revises existing classifications, these decisions are subject to the notice and comment requirements of the *EBR*.

In this case, one of the applicants experienced serious adverse effects from the inadvertent release of pesticides that were contained in an imported container and spilled out when he was opening the container. The ECO agrees with MOE that the original application of the spilled Dinex was not regulated by MOE and was not subject to the *Pesticides Act*.

The MOE also noted in its response to the application that prosecutions of offences under the *Pesticides Act* must be launched within two years after the date of the alleged incident, and the contraventions were alleged to have taken place in May 2001. Section 48 of the *Pesticides Act* states that "a proceeding for an offence against this Act or the regulations shall not be commenced after two years after the date on which the offence was, or is alleged to have been, committed." Thus, the limitation period was exceeded shortly after MOE received the application. This situation may be contrasted with provisions in the *EPA* that trigger the two-year limitation period only after ministry staff have learned of the alleged contravention.

The ECO commends MOE for reviewing whether an alleged contravention of the waste handling provisions of the *EPA* might have taken place when the pesticide was spilled even though the applicants did not allege that the *EPA* had been contravened by the goods importer. MOE went beyond its obligations under the *EBR* and this was appropriate in this case. With respect to the alleged contravention of the *EPA*, the ECO agrees with MOE that the incident took place inside a workplace and the Ministry of Labour was better positioned than MOE to respond to the indoor air quality problems described by the applicants.

This application also highlights the risk of importing invasive alien species in wood packaging materials. (For a review of current Ontario government policies on invasive species, see the ECO's 2003/2004 annual report on pages 48-52). According to the CFIA, many invasive plant pests have been found in pallets, crating or other wood packaging materials. The introduction of the Asian long horned beetle, pine shoot beetle (*Tomicus piniperda*), emerald ash borer (*Agrilus planipennis*) and other invasive alien species now established in parts of North America has been linked by the CFIA and other agencies to international shipments containing wood packaging materials. As noted by the CFIA, the exact risk varies depending on the quality, conditioning and degree of finishing of the transported wood and packaging material; problems are rare in better quality wood.

In January 2004, the federal government adopted a revised directive for wood packaging (D-98-08). This CFIA directive provides the requirements for the entry for all wood packaging materials including pallets or crating made from non-manufactured wood entering Canada from all areas except the continental United States (a separate Canada-US agreement is in place). It also outlines the disposal and processing procedures that apply to all regulated wood packaging materials not meeting the entry requirements. According to the CFIA, this revision was undertaken to update Canadian entry requirements following the completion of a Canadian pest risk analysis related to the importation of wood packaging materials. It also reflects the regulatory guidelines established in International Standard for Phytosanitary Measures (ISPM) #15: "Guidelines for Regulating Wood Packaging Material in International Trade". Under the revised CFIA directive, CFIA inspection staff "will inspect imports containing wood packaging materials at a rate specified within Area operational work plans. Inspectors will verify that wood packaging materials are marked appropriately or accompanied by appropriate certification documents and that the wood packaging material does not contain any pests or signs of living pests." However, this directive does not appear to address the issue of banned pesticides being imported along with wood packaging materials.

The PMRA and other international agencies also are working on harmonization initiatives that are intended to ensure that older pesticides such as Dinex are banned in other nations and not used for pre-treatment of wood packaging. In the long-term, these types of harmonization initiatives should reduce the likelihood that the problems associated with pesticide spills such as the one that took place in Kanata in May 2001 will be repeated in Canada.

Review of Application I2003005: Alleged *EPA* and *OWRA* Contraventions by the City of Collingwood (Investigation Undertaken by MOE)

Background/Summary of Issues

In August 2003, the ECO received an application for investigation from two applicants concerned with the drainage of stagnant water from private properties onto a public laneway and the applicants' property, and into Nottawasaga Bay. Specifically the applicants alleged that faulty installation of a subsurface tile drainage system by the Town of Collingwood had caused flooding in contravention of the *Ontario Water Resources Act* (*OWRA*) and section 14 of the *Environmental Protection Act* (*EPA*). The applicants also alleged that the stagnant water is:

- Polluting the water table and their well
- Degrading the shoreline and water of Nottawasaga Bay
- Posing a health risk
- Creating mosquito-breeding areas.

The applicants first became aware of the problem in the spring of 2003 when they experienced flooding and mosquito infestations. In the previous year, gas lines were installed along the applicants' road and a subsurface tile drainage system was installed to improve drainage in the area. The drainage system discharges water onto a public laneway next to the applicants' property. The applicants note that the drainage problem was aggravated when a neighbour dug a trench to ease flooding on his property. As a result of these actions, the applicants alleged that stagnant water is now causing flooding on their property and that their daughter has become ill twice from contact with polluted soil and water. The applicants also claim that no environmental study or inspection was done prior to the 2002 construction.

Ministry Response

MOE agreed to conduct the investigation in late August 2003. An MOE officer inspected the applicants' property and well on September 19, 2003, and found neither conclusive evidence indicating that the construction carried out in 2002 caused flooding on the applicants' property nor non-compliance with section14 of the *EPA* or the *OWRA*. The *EPA* prohibits the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect and the *OWRA* prohibits the discharge of any material that may impair the quality of water. As a result of its findings, MOE notified the applicants on November 13, 2003, that no further action would be taken.

During the site visit, the MOE investigator found no stagnant surface water on the applicants' property. However, MOE did note in its decision summary that because the area is low lying, the applicants' property would experience standing pools of water under normal rainfall. The MOE investigator also found no apparent structural problems with the applicants' well casing and observed that the slope of the land would provide adequate drainage away from their well. MOE concluded that there has been no impact on ground water quality.

Although MOE is taking no further action with respect to this matter, MOE did suggest that the applicants contact the Simcoe County District Health Unit about their mosquito breeding/infestation concerns and human health issues. MOE also explained in its decision summary that subsurface tile drainage systems do not require MOE approval and that drainage issues are the responsibility of the local municipality under the *Drainage Act*. MOE also indicated to the applicants that the Town of Collingwood is continuing to explore options to improve drainage in the area.

ECO Comment

The ECO is pleased that MOE undertook this investigation and that MOE carried out a site inspection. In addition, MOE completed this investigation in a timely fashion. The ECO does agree with MOE's decision to take no further action since it did not find any stagnant water on site on the day of the investigation, nor did it find any structural problems with the applicants' well. MOE also noted that there was adequate drainage of water away from the applicants' well. Water quality testing would provide the applicants with greater assurance as to whether or not their well is contaminated. Since the main concerns of the applicants involved human health, which is the responsibility of the local Health Unit, and drainage, which is the responsibility of the municipality, MOE's actions were limited to verifying that the applicants' well was unlikely to become contaminated by the stagnant water. In this case, MOE was able to verify that there were no apparent structural problems with the well and concluded that the stagnant water would be unlikely to cause contamination. MOE did provide additional information to the applicants suggesting that they contact the Simcoe County District Health Unit regarding their mosquito breeding/infestation concerns and directed the applicants to the *Drainage Act* to address intermittent flooding concerns.

Review of Application I2003006: Alleged *EPA* Contravention from Ford Drive in Oakville (Investigation Denied by MOE)

Background/Summary of Issues
The applicants have alleged that the Town of Oakville is out of compliance with section 14 of the *Environmental Protection Act* (*EPA*) due to excessive noise from traffic on Ford Drive, the road behind the applicants' house and yard. The applicants note that other nearby homeowners (with similar rear frontage) experience problematic noise levels. The applicants are also concerned about the information and methodology used in several studies conducted to assess noise on Ford Drive.

The portion of Ford Drive in question is a four-lane arterial road south of the Queen Elizabeth Highway in Oakville. In the applicants' neighbourhood, Ford Drive passes by the Ford Motor Company of Canada Assembly Plant and a residential subdivision. The Town of Oakville had responsibility for Ford Drive until January 1, 2004 when the road became the responsibility of the Regional Municipality of Halton.

Provincial and Municipal Rules
The *EPA* provides for the protection and conservation of the natural environment (air, land and water), and under section 14 prohibits the discharge of a contaminant that causes or is likely to cause an adverse affect. Under the legislation, "contaminant" includes sound and "adverse affect" includes losing the enjoyment of normal property use.

Although MOE has not developed any regulations to support the *EPA*'s inclusion of sound as a contaminant discharge, the ministry has two sets of guidelines relating to noise limits. One set addresses noise from stationary sound sources in rural and urban areas. The other set provides noise assessment criteria for use in land use planning. Both sets of guidelines replace the *Model Municipal Noise Control By-Law, Final Report, August 1978* developed by MOE to guide municipalities in their development of noise control by-laws.

MOE has not developed any policies or guidelines to specifically address the mitigation of noise affecting existing land uses. As a result, the noise assessment criteria for use in land use planning serve as a general interpretation of "acceptable" noise levels in situations such as those raised by the applicants. The noise assessment criteria establish levels for the outdoor living area at 55 "dBA" (a type of measurement used for sound levels) during the entire daytime period (07:00-23:00). MOE says that it would not consider the potential for adverse impact unless a noise assessment showed more than a five-dBA increase above the noise assessment criteria.

Municipalities may develop noise by-laws as well as policies to cover noise mitigation measures. The Town of Oakville has a policy for mitigating noise along town streets. The policy says that the town will consider noise abatement features for a noise level that is more than 60 dBA (between the hours of 07:00-23:00), assuming that mitigation measures can reduce the noise level by a minimum of five- dBA. The following provisions are also included in the policy:

- The town will provide noise abatement features only for outdoor living areas (OLA);

- MOE guidelines will be used to calculate noise levels; the maximum height for a noise wall is three metres above the road's centre line (2.5 metre height is preferred);
- The minimum number of residences to be considered for the policy is five dwellings and 50 linear metres of noise barrier; and,
- 25 per cent of an approved project's cost would be covered by the landowner.

Municipalities adjacent to Oakville (Burlington and Peel) as well as the Regions of Halton and Peel have noise retrofit policies with common technical and financial criteria.

Noise Studies for Ford Drive

The potential impact of noise from Ford Drive on abutting houses has been assessed and documented on several occasions over the years. The most recent studies show the following results:

- 2001 Noise Barrier Retrofit Needs and Cost Assessment prepared for the town of Oakville:
  - predicted that 2011 noise level (with existing barriers) based on noise modelling software would be 55 dBA at properties that begin two houses past the applicants' dwelling.

- 2002 *Draft Environmental Noise Impact Analysis* prepared by a pipeline company (to address the construction noise impact of a natural gas pipeline within the Ford Drive right-of-way):
  - stated that current noise level in OLA is 55 dBA in the applicants' rear yard
  - stated that current noise level on the applicants' back deck is 61 dBA

- 2004 *Noise Impact Study Ford Drive Adjacent to Lansdown Drive* prepared for the Town of Oakville and the Regional Municipality of Halton:
  - stated that current noise level in OLA (with existing barriers) ranged between 54 to 62 dBA along a stretch of seven properties, including the applicants'
  - predicted that 2021 noise levels in OLA (with existing barriers), based on traffic estimate, would range from 57-64 dBA

The Applicants' Concerns

The applicants are concerned about excessive noise arises from traffic volume (including the volume of heavy truck traffic) and the speed of drivers (documented by the town at levels exceeding the posted limit of 70 km/hr, in the range of 82-86 km/hour). According to the applicants, normal conversations in rear yards are often impossible without shouting, causing residents to spend little time outside. The applicants also assert that noise inside the home has led to sleep disruption.

Some of the homes with rear frontage have a wooden barrier between the yard and Ford Drive (although in some cases the noise barrier does not shelter the living areas) and other homeowners have exposed yards. The applicants do not believe that the wooden barrier solves the problem.

The applicants also note that their house has an elevated rear deck (4.5 metres from the ground), serving as the main exit at that level. The wooden barrier does not block sound from reaching the deck.

The applicants acknowledge that noise has been present since the initial housing development was put in place and that property titles contain a warning regarding future increasing noise levels. Specifically, "…noise levels from increasing road traffic on Highway 403, Ford Drive and/or the Queen Elizabeth Way may continue to be of concern, occasionally interfering with some activities of the dwelling occupants, as the noise exposure level may exceed the noise criteria of the municipality and the Ministry of the Environment."

The applicants cite concerns with the town's position regarding the noise issue, and with the methodology and results of the 2001, 2002 and 2004 reports. For example, the 2001 report addressed the potential locations and cost impact of new noise wall retrofits but did not include Ford Drive as a candidate site, based on that study's findings. As a result, the town's approved list of candidate sites for noise walls did not include Ford Drive. Regarding the 2002 report, the applicants: question the accuracy of traffic figures provided by the Town for use in the noise assessment documented in the 2002 report and believe that the study incorporated an incorrect interpretation of the noise measurements. One of the applicants has expressed concern that the 2004 report had a narrow focus by concentrating on several houses (with the low sound barrier) and not another house in the area that is exposed (i.e. without a barrier).

The applicants have expressed concern on several occasions that various noise assessment interpretations have not included their house's rear deck as part of the OLA. The applicants believe that the rear deck should be included because this is the main exit point into the OLA and because noise levels are elevated on the deck. However, MOE agrees with the noise calculations that did not include the rear deck. MOE guidelines define the measurement of the OLA as follows: "For the purposes of noise impact assessment in an Outdoor Living Area, the point of assessment is typically 3m from the building façade and 1.5m above ground."

Ministry Response

MOE declined the request for investigation under section 77(b) of the *EBR*, having found the alleged contravention not serious enough to warrant an investigation by the ministry at that time.

The ministry also stated its view that the municipality has the primary jurisdiction for vehicular traffic noise. As such, MOE asserted that the applicants' participation in a petition made to the Town of Oakville and the town's evaluation process for the noise situation was the proper procedure to follow.

MOE also noted that it would review the situation if the town's investigation (that led to the 2004 noise report) indicated that noise from Ford Drive causes or is likely to case an adverse effect and proper mitigation in not undertaken.

The ministry followed through on this commitment by having its noise experts review the 2004 *Noise Impact Study*. According to verbal communication from MOE staff, the ministry agrees with the methodology used in the *Study*. The ministry found that the report's findings do not constitute adverse impact because the noise results were not five dBA over the ministry's maximum guidelines. MOE has offered to put these findings into a letter if requested by the applicant. MOE has also made a verbal commitment to the applicants and the ECO to review any other evidence the applicant may provide in the future regarding possible violations of the *EPA*.

ECO Comment

Many human activities result in noise discharges into the environment. At low levels, these discharges are often accepted as a daily fact of life. However, at high levels, noise can seriously interfere with people's use of the outdoors, and can possibly damage human health and the environment. That is why the *EPA* specifically prohibits sound discharge that is likely to cause an adverse effect. The ECO acknowledges that noise sensitivity and the impact of noise on human health may vary between individuals, complicating the efforts of regulatory authorities to set standards. However, this application highlights several policy issues regarding noise from municipal sources that would benefit from attention.

MOE's denial of the investigation request should have included a better rationale for the decision for two reasons. First, MOE said that it reviewed the supporting documentation submitted with the application and that it had discussed the matter with the Town of Oakville. The supporting documentation sent with the application included records of ongoing communication between the applicants and the town, and the 2001 and 2002 noise reports for Ford Drive. Given the applicants' concerns with the methodology and conclusions of the noise reports, the ministry should have explained how its review of the information factored into the decision to not grant the request.

Second, given the *EPA*'s inclusion of noise as a contaminant, MOE should have put in writing the legal and/or policy basis for its statement that "the primary jurisdiction for vehicular traffic noise lies with the municipality involved." In our 1999/2000 annual report, the ECO expressed concern about MOE's implementation of "Procedures for Responding to Pollution Incident Reports" that directed ministry staff not to respond to most complaints involving noise and odours, and listed a number of sources of air and noise discharges that MOE staff should refer to municipalities when a complaint is received. (See pages 90-91 of the ECO's 1999/2000 annual report for additional information.)

In its response to the applicants, MOE did commit to review the situation further, pending the outcome of the town's investigation (that led to the 2004 Noise Impact Study). The ECO is pleased that in Spring 2004, the ministry followed through on its commitment by having staff review the 2004 Study. MOE has indicated verbally to the applicants and to ECO staff that it concurs with the report's methodology and conclusions, specifically that noise from Ford Drive does not constitute and adverse affect at this time. The ministry also confirms that the municipality is responsible for ensuring adequate mitigation of noise. Finally, MOE has told the applicants and the ECO that the ministry will review any information the applicants provide in future regarding Ford Drive noise levels that may constitute an adverse effect under the *EPA*.

MOE has only general guidelines to direct its abatement activities around noise issues, despite the *EPA*'s prohibition against the emission of noise as a contaminant. Furthermore, those guidelines address future land use planning and the approval/abatement issues of stationary sound sources, not the mitigation of ongoing noise sources. This is cause for concern, given that local land use planning methods are sometimes not sufficient to control noise emissions, and considering that removing noise pollution from province-wide control can create inconsistencies among communities across Ontario. (See pages 71-72 of the ECO's 1999/2000 annual report for additional information.)

While noise issues would likely be considered during the planning for new or upgraded roads or public transportation facilities, road noise impacts may still pose a real problem because:

- Travel speed, road or rail capacity, and/or the types of vehicles using the roads can affect nearby land uses if proper monitoring or enforcement measures are not taken at the municipal level
- Many houses and institutions have been built in the past without the incorporation of noise mitigation features such as specially designed windows, air conditioning or noise attenuating berms/fences
- The cumulative effects of various noise sources on sensitive land uses may not have been incorporated into planning processes or design practices.

In June 2004, the Ministry of Municipal Affairs and Housing (MMAH) posted a notice on the Environmental Registry that sought input on revisions to Ontario's *Planning Act* (legislation that guides municipal land use decisions). The province is consulting on planning reforms to determine the type and extent of changes to the *Planning Act* and possibly to provincial policies, regulations and programs: "in order to build stronger, better communities and to address the challenges facing Ontario." (See Registry notice PF04E0003 for more information).

At the same time, MMAH posted a notice on the Registry (PF04E0004) that described several provincial priorities including urban intensification, and sought input into draft Provincial Policy Statements under the *Planning Act*. These Policy Statements provide overall policy direction on matters of provincial interest related to land use planning and development that municipalities must reflect in their planning decisions. The Registry notice states that the province is seeking to balance a range of policy goals such as building strong communities, protecting the environment and resources, and supporting a strong economy. Thus, it is timely for MOE to consider whether its policies provide adequate direction on noise avoidance and mitigation measures.

In summary, the ECO urges MOE to review the need for provincial policy changes or enhancements to address municipal noise issues, and to curtail possible disruption from urban intensification. Clearer policies from MOE on noise standards and related abatement activities would be beneficial, since the *EPA*'s inclusion of sound as a contaminant creates an expectation for ministry guidance and enforcement.

Review of Application I2003007:
Alleged *EPA* Contravention by Sheldrick Sanitation Ltd.
(Investigation Denied by MOE)

Background/Summary of Issues

This application is about a waste transfer station in Smithville, Ontario, which the applicants allege has been contravening the *Environmental Protection Act (EPA)* by emitting odours causing an adverse effect. The application was submitted in October 2003, and included copies of letters written by local residents in 2003 and 2002, complaining of foul garbage odours observed on numerous occasions that affect properties located near the waste transfer station. These letters had previously been sent to the local office of the Ministry of the Environment (MOE).

The applicants alleged that the waste transfer station (Sheldrick Sanitation Ltd.) was contravening s. 14 of the *EPA*, which states that "Despite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect." Under the *EPA*, the definition of "adverse effect" includes loss of enjoyment of normal use of property and interference with the normal conduct of business.

This waste transfer station is located at a site that is zoned industrial, and is sited near light industrial facilities. The transfer station announced plans to expand its waste processing facility in 2000, and its expansion proposal was designated under the *Environmental Assessment Act* (*EAA*) in 2001. To meet the requirements of the *EAA*, the company is currently preparing Terms of Reference for the planned expansion. There is significant public concern about the proposed expansion, and MOE notes that complaints about odours have increased substantially since the expansion plans were announced. From 1998 to 2000, there were a total of two odour complaints. The complaints increased in each of the following years, and in 2003 the ministry recorded 68 odour complaints.

Concerned residents have submitted two previous *EBR* applications about this facility, and MOE denied both applications:

- The Supplement to our 2002/2003 annual report (page 195) outlined a request for new waste management regulations under the *EPA*. This request (R2001017) was submitted because the applicants believed that the Sheldrick Sanitation facility was inappropriately sited in a light industrial area, adjacent to a school and residential area. The applicants also had concerns about traffic impacts and the adequacy of MOE's monitoring and enforcement.

- The Supplement to our 2001/2002 annual report (page 253) outlined a request to amend the Certificate of Approval (C of A) for Sheldrick Sanitation. This request (R2001013) was submitted because the applicants believed the existing C of A had inadequate safeguards for storm water collection, odour control, dust and vector control, landscaping or financial assurance.

Ministry Response
MOE denied this request for an investigation on the grounds that it would be redundant. The ministry noted that its staff had conducted a large number of site visits in 2002 and 2003, and had also issued a Provincial Officer's Order to the company in November 2003. The Order required the company to produce and implement an odour abatement plan by March 31st, 2004. Aside from this requirement, MOE noted that the company is complying with their Certificate of Approval.

MOE's decision was supported by a Provincial Officer's Report, dated November 5, 2003. This report provided a detailed description of an MOE site visit on July 15, 2003. The MOE Provincial Officer concluded from his site visit that on the day in question, Sheldrick was contravening the *EPA*, s.14, by releasing odours that were adversely impacting off-site property owners. The report also documented that shortly after this site visit, the company proposed to voluntarily undertake an odour assessment. However, the company did not adequately follow through on its voluntary commitment to do the assessment, despite frequent reminders from MOE staff from late July through October. Therefore, MOE decided to issue a Provincial Officer's Order in November.

The Provincial Officer's Report also noted that the company had taken a number of steps to control odour, including the:
- Purchase and installation of new deodorizing equipment in the building
- Purchase of a deodorizing truck with positive pressure spray
- Purchase of new truck for removing industrial and commercial waste as soon as possible
- Establishment of an odour control program
- Establishment of an odour complaints procedure
- New rule that north and south overhead doors of facility not be opened simultaneously.

ECO Comment
It appears that the applicants in this case had a valid concern about odours from the transfer station causing an adverse effect, since MOE staff came to the same conclusion on at least one site visit. However, MOE made a reasonable decision in this case not to carry out an investigation under the *EBR*, since the ministry has visited the site a number of times in the past two years, and has recently ordered the facility to submit and implement an odour abatement plan, by a legally enforceable timeline. As noted above, in response to the ministry's abatement activity, the company has also taken other steps to control odour problems. MOE provided the ECO with an update in June 2004, reporting that the odour abatement plan was submitted on November 21st , 2004. The plan includes enhanced staff training, community odour detection surveys, the installation of a weather station, and a complaints hot line. MOE also reports that no odour complaints have been received so far in 2004.

Review of Application I2003008:
Alleged *EAA* Contravention by the City of Ottawa
(Investigation Denied by MOE)

Background/Summary of Issues

This application raises concerns about the selection process for an engineering solution to leaking sewage lagoons in a suburban area of Ottawa. The leaking sewage lagoons were built in the 1970s for the hamlet of Munster, and are also the focus of another current application under the *EBR* (see pages 292-297 of the Supplement). The selection process has been carried out by the City of Ottawa, and while a variety of engineering approaches have been considered, the city has decided to proceed with a pipeline option that will pump sewage from Munster to the city's main sewage treatment plant. This has been a highly controversial project since its early planning stages in 1996. Ottawa's selection process has been bound by the rules of the Municipal Class Environmental Assessment (June 2000), which is issued under the *Environmental Assessment Act,* and covers municipal sewer projects. The Municipal Class Environmental Assessment was developed by the Municipal Engineers' Association. The history of the city's EA process is described in more detail on pages 292-294 of the Supplement.

The applicants in this case allege that the City of Ottawa has contravened (or is about to contravene) the *Environmental Assessment Act (EAA).* Specifically, the applicants allege that to comply with the *EAA*, the city must file a second "Addendum" with a 30 day public comment period before proceeding with the pipeline option. Under the Municipal Class EA, proponents must prepare an Addendum if they select an alternative that results in a "significant modification to the project or change in the environmental setting for the project which occurs after the filing of the Environmental Study Report (ESR)". The applicants allege that the Addendum prepared by the city in 1999 to support the pipeline option is not adequate, for the following reason: After the city completed the 1999 Addendum and decided in favour of the pipeline, concerned citizens appealed the issue to the Ontario Municipal Board (OMB). The OMB ruling advised the city to re-evaluate three of the sewage treatment alternatives, including the pipeline option, and to hire an independent consultant to do the re-evaluation. The applicants state that "The effect of the OMB decision was that the proponent had to undertake a re-evaluation of wastewater treatment alternatives for Munster Hamlet *both* in accordance with the requirements of the OMB decision relating to good land use planning, *and accordingly*, in a manner consistent with the requirements of a Class EA."

Following the OMB ruling, the city did retain a new consultant (R.V. Anderson Associates) for a re-evaluation of the three alternatives. The consultant produced a report in December 2002 which concluded that all three alternatives would work from an environmental perspective, but that the pipeline would be most expensive. This report recommended that the city proceed with either of two on-site communal wastewater treatment systems. In response to questions from the city about this report, the consultant then submitted a further technical memorandum in April 2003, which indicated that over a very long-term life cycle of 60-90 years, the projected cost of the pipeline was not much more than that of the two alternatives. Furthermore, since the pipeline had approval under the *Environmental Assessment Act*, it could be in place 12-18 months sooner than the alternatives. Shortly after receiving this technical memorandum, the city reconfirmed its intention to build the pipeline. Essentially, the applicants argue that the city's decision to build the pipeline flows from the two documents prepared by R.V. Anderson in 2002 and 2003. Since the 1999 Addendum could not include or refer to reports that had not yet been prepared, the applicants argue that a second Addendum is required.

To support their argument that traceability is needed, the applicants cite the Municipal Class EA: "One of the key principles of successful planning under the *EAA* is "to provide clear and complete documentation of the planning process followed, to allow for the traceability of decision making with respect to the project."
The applicants also argued (citing S. 15 of the *EAA)* that MOE has an obligation to review documents prepared in accordance with the Class EA. The applicants stressed that it was especially important for MOE to review the two reports prepared by R.V. Anderson, "since the first recommends against the city's preferred alternative and the second, which remains unsigned by its author, gives no recommendations". While the applicants did not elaborate further on this point, the two reports by R.V. Anderson have been the subject of debate and conjecture in Ottawa newspapers. Commentators and reporters have wondered whether the city asked the consultant look at the numbers again to come up with a new answer. Some have described it as a massaging of numbers, and a questionable process.

While the applicants focused their *EBR* application on the technical point of the missing second Addendum, it is clear that their over-arching concern is with the proposed pipeline. The pipeline approach is strongly opposed by many residents of the village of Richmond. The applicants briefly described the negative environmental consequences that they fear may follow from the construction of the pipeline. They noted that the sewage pipe will be routed through the village of Richmond and past approximately 1,500 homes that depend on a shallow aquifer for their water supply. Leaks from the pipe (which would conduct sewage pumped under pressure) could contaminate this water supply. They noted that a section of sewer pipe installed in 2001 under the bed of the Jock River near the village of Richmond has already failed twice. The addition of sewage from Munster would further stress this weak part of the sewer system, with resulting risks to the Jock River. Finally, the applicants point out that no assessment has been completed for impacts of the proposed pipeline on the Richmond Fen Wetland, a provincially significant wetland along the planned route.

Under the Municipal Class EA process, there have been several mandatory opportunities for public comment on this project, notably in 1996 when the Environmental Study Report (ESR) was released, and again in 1999 when an Addendum was filed describing the pipeline option. At both times, there was a 30 day public comment period, and an opportunity for members of the public to request that the Minister of the Environment order an individual environmental assessment (This is known as a Part II Order; formerly known as a bump-up request). In both 1996 and in 1999, members of the public did make such requests, and MOE denied the requests. If the city were to file another Addendum as desired by the applicants, this would trigger another mandatory 30 day public comment period, with another opportunity to request a Part II Order. Under the Municipal Class EA, construction or similar activity on a project must cease during the 30 day public comment period, and also during the time when the minister is considering requests for a Part II Order.

Ministry Response
The ministry decided that it was not in the public interest to conduct an investigation. The ministry noted that it had previously provided guidance to the city that no new Addendum was needed if the re-evaluation of the alternatives did not result in a significant change to the undertaking. The ministry also pointed out that the city will still need to address more site specific environmental impacts and operational matters in detailed design work, in order to obtain approvals under the *Ontario Water Resources Act* (*OWRA*), under *OWRA* regulations and under applicable ministry policies.

The ministry noted that it had reviewed issues similar to this request for investigation in the past, and had communicated the results of these reviews to the appropriate parties. Based on these earlier reviews, as well as a review of the information provided by the applicants, the ministry "has not identified any significant changes to the project or the environmental setting which would warrant preparation of an addendum."

The ministry also noted that the planning and development of the project by the city was thoroughly reviewed by the ministry at several stages of the process, in response to bump-up requests and when the 1999 Addendum was prepared. As a consequence, "the ministry has no outstanding concerns with this project as part of the Class EA process."

The ministry emphasized that under the *EAA*, the proponent has the responsibility to follow the Class EA, and that it was the city's decision to proceed under the 1999 Addendum.

With regard to the assertion by the applicants that under S. 15 of the *EAA* there was an obligation for MOE to carry out a review, the ministry pointed out that this was a misinterpretation by the applicants. In fact, S. 15 of the *EAA* does outline the procedures to review a parent Class EA, such as the Municipal Class Environmental Assessment, which applies province-wide. S. 15 does not apply to a review of documents prepared for a specific project, such as the Munster Sewage Lagoons. MOE then noted that the ministry did participate in the government agency review of the city's ESR and Addendum, under the Class EA.

ECO Comment
The key question raised in this application was whether the City of Ottawa needed to file an Addendum under the Municipal Class EA for the Munster sewage pipeline. MOE determined that an Addendum was not necessary, using the language of the Municipal Class EA as guidance on this point. The pertinent language states: "Any significant modification to the project or change in the environmental setting for the project which occurs after the filing of the ESR shall be reviewed by the proponent and an addendum to the ESR shall be written." Based on the information available, the ministry decided that it "has not identified any significant changes to the project or the environmental setting which would warrant preparation of an addendum."

Considered within the framework of the Municipal Class EA, and the information provided by the applicants, this was a reasonable decision by the ministry. The applicants drew attention to twists and turns in the planning process for the pipeline project, but they did not assert that the pipeline project itself had been modified, or that the environmental setting had been changed. The applicants raised concerns about risks to groundwater, which is the local drinking water supply, and noted that potential impacts on the Richmond Fen Wetland had not been assessed, but the ministry responded that the city would still need to address more site-specific environmental impacts and operational matters in detailed design work.

The ministry's decision not to investigate was made by the Director of the Environmental Assessment and Approvals Branch. On the one hand, this branch has a special expertise in interpreting the requirements of the *EAA*. On the other hand, this branch has had significant past involvement with the case, including preparing recommendations on bump-up requests, and reviewing previous phases of the project under the Class EA. The applicants have voiced concerns that this investigation ought to have been conducted by a person not previously connected with the issue. The ECO has also recommended in several annual reports that where possible, decisions on *EBR* applications should be assigned to staff not previously involved with the case, to allow for a fresh perspective.

Little Oversight by MOE

Considered within a broader perspective, this application illustrates once again some of the key characteristics of Ontario's Class EA processes, which are designed to streamline environmental approvals, but which can be very frustrating to members of the public. The ECO describes this issue in more detail on page 52-59 of the annual report, and has previously outlined its concerns in the 2001/2002 annual report.

The applicants in this case were clearly hoping for MOE to review and comment on the city's decision-making, and perhaps intervene and order the city to prepare an addendum. However, since the Municipal Class EA has been set up as a self-assessment process, it provides for relatively little oversight by MOE.

Similarly, the Municipal Class EA does not require MOE to provide guidance to proponents on how to interpret and implement Class EA requirements. On the contrary, it suggests that proponents develop their own guidance documents, if they need more direction.

> There are, however, some municipalities who desire greater direction, assistance or reassurance in carrying out their Class EA process, particularly when interpreting the schedules, conducting Master Plans, and coordinating with other legislation, particularly the Planning Act....The Class EA establishes principles and certain minimum mandatory requirements and has been set up as a self assessment process which is flexible enough to allow different proponents to meet the needs of specific projects which ensuring that the requirements of the EA Act are met. If a proponent determines that it requires more specific direction, then it may be appropriate for them to develop their own guidance documents to provide supplementary direction for project managers.

Furthermore, the Municipal Class EA puts the onus on the proponent rather than on MOE to decide whether further study is needed, whether an Addendum should be filed, or whether negotiation is needed to resolve contentious issues. Proponents also get little help from MOE on public consultation approaches: MOE has been developing and revising a draft *Guideline on Consultation in the Environmental Assessment Process* since 1995, but has been unable to finalize this key guidance document.

Limited Opportunities for Public Input on Technical Approvals
The applicants in this case were also hoping for a further opportunity for public input on this project. Under the Municipal Class EA, the filing of a second Addendum would have triggered a 30 day public comment period and the chance to request a Part II Order. Without a second Addendum, further public consultation opportunities will depend on the proponent, since this project has entered "project implementation", during which public consultation is deemed "optional". In this case, the city did commit to further public consultation as part of the design of the pipeline routing in Richmond, and plans to update the public about construction by means of public notices and public information sessions.

MOE informed the applicants in this case that the city would still need to obtain approval under the *Ontario Water Resources Act* and would need to meet all applicable ministry policies, but it is unlikely that any related approvals will be posted for public comment on the Environmental Registry as a regular instrument proposal. The reason is that MOE considers any approvals issued as part of an undertaking under the *EAA* to be exempted from the Registry's public notice and comment requirements by virtue of S.32 of the *EBR*. The ECO drew attention to this in the 2001/2002 annual report: "The streamlined EA processes reviewed by the ECO are seriously flawed because public input and participation opportunities are not clearly established for both project planning and the issuance of environmentally significant instruments. Public comment should be provided for at both these stages." This example provides further evidence of the inadequate transparency and accountability features of the Class EA process, especially compared to the *EBR*'s notice and comment and appeal features.

The applicants in this case are concerned about the environmental risks of leakage from the proposed sewage pipeline, and the possible impacts of leaks on local wells used for drinking water, as well as impacts on the Jock River and a sensitive wetland. They have resorted to requesting an Addendum under the Municipal Class Environmental Assessment because they are uncertain of future public consultation opportunities on the matter, and they have exhausted their rights to request MOE to intervene and order a full EA. One of the only other options that would be available would be to apply to the courts for a judicial review, but past court decisions suggest this probably would not succeed. Practically speaking, there is no way for groups like this to force a full EA (i.e., more detailed environmental study, with the potential for a hearing) on this type of dispute. One legal commentator has described the likelihood of referral to an *EAA* hearing under the current system as "practically nil". In fact, from April 1995 to November 2001 a total of 271 bump-up requests were reviewed by the minister, and none were granted. In contrast, if the approvals were subject to the *EBR*, these applicants would be able to seek leave to appeal at the Environmental Review Tribunal for a hearing on specific environmental protection grounds.

For this particular case, MOE could respond to persistent public concerns by committing to public consultation opportunities that are comparable to *EBR* public comment rights on any approvals that are issued to the project under the *Ontario Water Resources Act*.

More generally, MOE should consider ways to address the observed deficit in public consultation opportunities in the Class EA process. The costs of this deficit are evident, and can be measured in prolonged acrimonious conflicts, reduced credibility of the EA process, and delays in needed environmental improvements.

Review of Application I2003009: Alleged *EPA* and *Waste Management Act* Contraventions by a Landfill Site (Investigation Pending by MOE)

Background/Summary of Issues
In February 2004, the applicants filed an application for investigation with MOE alleging the contravention of the *Environmental Protection Act*, specifically ss. 14, 15, 31, and 40. The applicants also allege the contravention of the *Waste Management Act*, specifically s. 12. The applicants are concerned about possible contamination from a landfill site.

The applicants also filed an application for investigation with MNR alleging the contravention of the federal *Fisheries Act*, specifically s. 35.

Ministry Response
MOE is expected to reach a decision on whether or not to conduct this investigation by April 25, 2004.

ECO Comment
The ECO will review the ministry's decision and handling of this application in the 2004/2005 reporting period.

MINISTRY OF NATURAL RESOURCES

Review of Application I2003010: Alleged *Fisheries Act* Contravention by a Landfill Site (MNR Returned the Application to the ECO)

Background/Summary of Issues

In February 2004, the applicants filed an application for investigation with MNR alleging the contravention of the federal *Fisheries Act*, specifically s. 35. The applicants are concerned about possible contamination from a landfill site.

The applicants also filed an application for investigation with MOE alleging the contravention of the *Environmental Protection Act* and the *Waste Management Act*.

Ministry Response

MNR returned the application to the ECO, stating that alleged contraventions of the federal *Fisheries Act* do not fall under the jurisdiction of the ministry.

ECO Comment

The ECO will review the ministry's decision and handling of this application in the 2004/2005 reporting period.

SECTION 7

EBR LEAVE TO APPEAL APPLICATIONS

SECTION 7: *EBR* LEAVE TO APPEAL APPLICATIONS

April 1, 2003 to March 31, 2004, Status as of June 30, 2004

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry # IA00E0427 **Applicants:** Carol S. Dillon and Melvyn E.J. Dillon; The Council of Canadians; Ken McRae; Michael Cassidy and Maureen Cassidy; Eileen Naboznak; Barbara Zents and Ray Zents; Anne German; Kathleen Corrigan **Ministry:** MOE **Proponent:** OMYA (Canada) Inc. **Date Application received by ECO:** September 6, 2000 **Instrument:** Permit to Take Water (PTTW), s. 34, *OWRA*	The applicants sought leave to appeal the decision to issue a PTTW increasing the allowable water taking from the Tay River to 4,500 m^3/day by the year 2009. The grounds for seeking leave included the following: the Director failed to protect the quality of the natural environment and foster the efficient use and conservation of resources by granting permission to take more water than the proponent requested; the Director based his decision on insufficient data; there was a lack of independence in the important functions of study, recording, and monitoring; and the Director failed to follow MOE's Statement of Environmental Values (SEV).	The ERT granted the leave to appeal application on the grounds that it was not reasonable for the Director to issue a PTTW for the taking of water in the absence of sufficient, pertinent data on the Tay River watershed. The ERT found that the absence of this information created a degree of uncertainty about impacts on the aquatic habitat of the Tay River which raised the possibility of significant harm to the environment. **Date of Leave Decision:** November 6, 2000	Appeal allowed in part by the ERT. Approval was given for a PTTW with revised and additional conditions. (See below for the partial reversal of this decision by the minister.) The Tribunal was not satisfied that MOE had undertaken sufficient evaluation to assure that the Tay River watershed would not be harmed with the taking of 4,500 cubic metres per day of water from the Tay River. Given that more detailed and comprehensive work would need to be done to assess the impacts of the much larger taking of water, the Tribunal decided that OMYA should be required to submit a new application to MOE under the *OWRA* to increase water-taking under the PTTW. The Tribunal decision also noted that MOE's SEV indicates that it does not apply to instruments issued by the ministry. However, the Tribunal held that the SEV should be considered each time

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Dillon et al., continued			an application for a PTTW is considered by MOE. **Date of Appeal Decision:** February 19, 2002 **Final Outcome:** In March 2002, OMYA appealed the ERT's decision to the Minister of the Environment. On February 14, 2003, the minister released his decision which partially overturned the ERT's decision. The minister permitted the taking of up to 1,483 cubic metres per day prior to January 1, 2004 and a maximum of 4,500 cubic metres per day on or after January 1, 2004. The minister also amended conditions related to annual reporting and public meetings. The PTTW expires on January 1, 2010. Following a change of government in October 2003, MOE revisited this issue. Effective January 9, 2004, MOE cancelled the PTTW that was issued

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
			in February 2003 and replaced it with a new PTTW that allows only for the taking of up to 1,483 cubic metres per day for the duration of the PTTW. Other conditions in the PTTW remain unchanged. The new PTTW was issued to comply with O.Reg. 434/03, a new regulation setting out new requirements related to the taking and use of water in December 2003.
Registry # IA01E0430 **Applicants:** Ellen Smith; Craig Edwards; Gilles Desmarais; Angie Desmarais; Paul Gingras; Carmel Gingras; Ron St. Jean **Ministry:** MOE **Proponent:** Inco Limited **Date Application received by ECO:** April 15, 2002	The applicants sought leave to appeal the decision to issue an order for remedial work. The grounds for seeking leave included the following: the Order allows contamination exceeding MOE's own absolute maximum guideline for nickel in soil of 7,100 ppm; it allows cancer risks to exceed MOE's written policy of not permitting cancer risks greater than one in one million; and it allows contamination to exceed levels 8 times greater than those already known and	The ERT granted the leave to appeal application on the basis of the first ground submitted by the applicants, finding that they had shown there was good reason to believe that the Director's decision was unreasonable, and that there was a possibility of substantial environmental harm. The Director argued his discretion should not be fettered by automatically adhering to non-binding, generic guidelines numbers, but the Tribunal found that the onus is on the Director to show valid reasons for departing from such guidelines. The guideline in question established an "absolute upper maximum" concentration level, and the Tribunal held that the use of such terms has the effect of reducing	Appeal settled The applicants sought judicial review at the Ontario Superior Court of Justice – Divisional Court of the ERT's decision to grant leave to appeal based on only one ground. The applicants took the position that once an applicant has met the stringent leave test in respect of one issue, any other ground of appeal may be added that does not meet the test. The court rejected the applicants' position and upheld the ERT's decision, dismissing the application for judicial review on the basis of prematurity, and that the

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Instrument: Order, s. 17, *EPA* **Smith et al., continued**	acknowledged by MOE to have significantly harmed the natural environment in Port Colborne.	the degree of discretion available to the Director. MOE did not show sufficient justification to depart from this standard. Having granted leave to appeal on this first ground, the ERT decided that it did not need to adjudicate on the other grounds submitted by the applicants. **Date of Leave Decision:** July 11, 2002	Tribunal's decision was reasonable. In the meantime, and prior to the Divisional Court decision, the ERT had clarified that all but two of the grounds raised by the applicants would be considered as part of the appeal. On October 10, 2003, the ERT dismissed the appeal after the parties reached a settlement and withdrew their appeals. The ERT ordered MOE Director to re-issue the Order with a new expiry date of December 31, 2004. On January 26, 2004, the Port Colborne residents once again applied for leave to appeal under the *EBR* in relation to a decision by the Director dated December 30, 2003 accepting a revised remediation plan for the cleanup of contaminated soils in Port Colborne. The submission and approval of this plan complied with the Order that was the subject of the original application for leave to appeal.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
			On March 11, 2004, the ERT decided that it did not have the jurisdiction to consider the residents' second application for leave to appeal the December 30, 2003 decision since it was a step in the implementation of the original Order, and did not require a new proposal notice on the Registry. As a result, s. 38 of the *EBR* did not apply to the decision and the ERT has no jurisdiction to consider allowing leave to appeal. The ERT was satisfied that the residents had enough opportunity to review Inco's remediation plans and recommend changes, adding that if they were not happy with the process, they would have to deal with the issue in another forum. The ERT indicated that by agreeing to the settlement, the residents had accepted this process.
Registry # IA01E1063 **Applicants:** Trent Talbot River Property Owners Association (TTRPOA); Marchand Lamarre and Jodi	The applicants sought leave to appeal the decision to issue a PTTW to dewater a proposed quarry. The grounds for seeking leave included the following: the PTTW application contains	The ERT granted the leave to appeal application of TTRPOA, Marchand Lamarre and Jodi McIntosh on the grounds that: the opinion of the Director "that the taking of water from the quarry would result in a drawdown of the water table in an area limited to the immediate	Appeal pending This hearing is scheduled to be held concurrently with the related sewage works C of A hearing (see Registry # IA03E0893 below).

Parties and Date of Leave Application	**Description of Grounds for Leave to Appeal**	**Decision on Leave Application and Decision Date**	**Status/Final Outcome**
McIntosh; and Sandra Southwell **Ministry:** MOE **Proponent:** Stan McCarthy **Date Application received by ECO:** November 8, 2002 **Instrument:** PTTW, s. 34, *OWRA*	conflicting estimates of the quarry's influence on the groundwater; the model submitted to the Director to estimate drawdown is based on four inaccuracies that underestimate the drawdown radius; and there was no consideration of the potential impact on significant surface water features such as the impact on springs, wetlands, or the Trent Canal.	surroundings of the site" is too conservative an interpretation of the data and modeling; the proposed quarry is located in a recharge area; and the vulnerability of local drilled wells to sulphurous and salty water emphasizes that there is potential for impacts on water quality as well as quantity. The ERT denied the leave to appeal application of Sandra Southwell based on insufficient evidence and because issuance of a PTTW is unrelated to the issuance of a Certificate of Approval for waste water discharge **Date of Leave Decision:** January 8, 2003	
Registry # IA02E1174 **Applicants:** Jesse Davidson; Mr. & Mrs. Garry Brewster; Mr. & Mrs. Russell Smith; Mr. & Mrs. Frank Weiner; and Mr. & Mrs. Fred Zinn **Ministry:** MOE	The applicants sought leave to appeal the decision to issue a PTTW to a commercial water bottler. The grounds for seeking leave included the following: the hydrogeological study was not required to include the cumulative effects on the water table of two large water taking plants situated in the same small watershed less	The ERT granted this leave to appeal application on the grounds that: each of the applicants had an interest in the decision to issue the PTTW; and it was unreasonable to grant a PTTW when no sub-watershed groundwater study had been done and many wells and springs in the local areas have gone dry. The ERT was of the opinion that there was a real chance that the environment could sustain significant harm if a PTTW was granted.	On June 25, 2004, MOE filed notice of an application for judicial review of the ERT's decision to grant leave to appeal the PTTW on the basis that the ERT erred in law or exceeded its jurisdiction by misstating the test for leave to appeal in s. 41 of the *EBR*, and erring in its application of the leave test by: failing to appreciate the conjunctive nature of the test; failing to apply the appropriate evidentiary onus and burden of proof; making

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Proponent: Aquafarms **Date Application received by ECO**: May 9, 2003 **Instrument:** PTTW, s. 34, *OWRA*	than one mile apart; nor was the study required to establish the source of the water extracted from Aquafarms' wells; MOE has received complaints from at least 14 property owners within a few kilometres of Aquafarms stating that their wells have dried up; and one applicant's farm which is on the same wetland as the Aquafarms' wells lost the spring which fed a natural brook trout producing pond in the previous autumn.	**Date of Leave Decision:** February 12, 2004	patently unreasonable factual findings; and granting leave on every individual ground without providing analysis or reasons. The application for judicial review is in progress.
Registry # IA02E1471 **Applicants:** Trent Talbot River Property Owners Association; and Marchand Lamarre and Jodi McIntosh **Ministry:** MOE **Proponent:** Thomas S.	The applicants sought leave to appeal the decision to issue a C of A for sewage works for quarry water. The grounds for seeking leave included the following: the Director ignored an earlier decision by the Tribunal that the proposed quarry operations could significantly affect water quantity for at least nine drilled wells within one kilometre of the site;	MOE revoked the C of A, with the result that it was no longer subject to an application for leave to appeal. **Date of Leave Decision:** June 19, 2003	Not subject to leave to appeal application The proponent was issued a new C of A on November 17, 2003. The applicants successfully sought leave to appeal this new C of A (see Registry # IA03E0893 below).

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
McCarthy & Barbara Ann McCarthy **Date Application received by ECO:** May 20, 2003 **Instrument:** Certificate of Approval (C of A), s. 53, *OWRA*	quarry operations are anticipated to result in ground and surface water resources being contaminated by arsenic, copper, lead, iron, zinc, sulphate, nitrate and ammonia; and untreated quarry effluent will be discharged directly into a watercourse considered to be fish habitat and upstream from an intake for drinking water.		
Registry # IA01E1705 **Applicant:** Bryan Smith **Ministry:** MOE **Proponent:** Collins & Aikman Products Co. **Date Application received by ECO:** June 19, 2003	The applicant sought leave to appeal the decision to issue a C of A for discharges to air. The grounds for seeking leave included the following: the decision notice indicated that no comments on the proposal were received although the applicant forwarded comments by registered post within the comment period; the applicant had a "reasonable expectation" that a decision would not be made or posted on the Environmental	The ERT ruled that it had no jurisdiction to adjudicate this leave to appeal application. In a letter to the applicant, MOE explained that since the comments raised by the applicant were relevant to a second C of A proposal (IA03E0595), MOE applied the comments to the latter proposal instead. MOE noted, that due to a delay in posting the decision notice for the first C of A proposal (IA01E1705), the applicant's leave to appeal was outside of the appeal period. MOE also explained that the abatement measures	No jurisdiction

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Instrument: C of A, s. 9, *EPA*	Registry on the last day of the comment period; and the applicant believes that the decision may have been made with undue haste.	included in the second C of A were capable of mitigating the concerns raised by the applicant. **Date of Leave Decision:** July 2, 2003	
Registry # IA03E0209 **Applicants:** Partnership for Public Lands; Northwatch; Jim MacLachlan; Laurent Robichaud; Stewart Hamill; and Nancy Wilson **Ministry:** MOE **Proponent:** Falconbridge Limited **Date Application received by ECO:** September 4, 2003 **Instrument:** C of A, s. 53, *OWRA*	The applicants sought leave to appeal the decision to issue a C of A for sewage works for the construction and operation of a mine water treatment system. The grounds for seeking leave included the following: the proponent intends to discharge mining effluent through a discharge pipe into the Groundhog River; the mining effluent will include contaminants such as copper, arsenic, cadmium, cobalt, lead, nickel, zinc and ammonia; the land and riverbed have been designated a Provincial Waterway Park and the river contains a provincially significant sturgeon spawning area; and MOE approved the C of A in	The ERT denied this leave to appeal application on the grounds that: the Director was not unreasonable in making his decision to approve the construction and operation of a mine water treatment system; and the decision was unlikely to cause significant harm to the environment. The ERT recognized that the applicants had raised serious grounds and had genuine concern for the project's potential impact on the environment, but held that the proponent and the Director had considered these concerns, and that they were reflected in the C of A's conditions, many of which went beyond normal MOE requirements for mining effluent quality monitoring and standards. The ERT noted Northwatch's concern about the potential for acid generation and concluded that this issue warranted further study and care in	Leave to appeal denied

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
	contravention of its own Provincial Water Quality Objectives. (See also the "Instruments" section of the 2003/2004 annual report for details.)	implementing procedures to ensure remedial measures are adequate for potential problems. **Date of Leave Decision:** October 31, 2003	
Registry # IA02E1522 **Applicants:** Lynda Lukasik and Zen Matwiyiw **Ministry:** MOE **Proponent:** Hamilton Bio Conversion Inc. **Date Application received by ECO:** November 6, 2003 **Instrument:** C of A, s. 27, *EPA*	The applicants sought leave to appeal the decision to issue a C of A for a waste processing site. The grounds for seeking leave included the following: the potential increase in nuisance odours because the type of waste processed by the facility is being changed from processing organic waste into animal feed, to processing sewage sludge into fertilizer pellets; it is not clear that the C of A will be amended to address increases to odour prior to the commencement of operations; the C of A has been issued in a "piecemeal approach" and will require intervention later; and clarification is needed as to how evaluation of the odour	The ERT granted this leave to appeal application on the grounds that: the applicants had an interest in the decision; it would have been reasonable for the MOE to have considered possible amendments to the proponent's C of A for air discharges under s.9 of the *EPA* prior to approving the waste disposal site C of A; the applicants' concerns related to potential odour and contaminant emissions were not considered; there is significant potential for harm to the environment if the amendment to the C of A is granted; and the risk of fire or an explosion should be explored further. **Date of Leave Decision:** May 7, 2004	Appeal pending

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
	discharge will be conducted by MOE.		
Registry # IA02E0765 **Applicants:** Allen and Jennifer Banfield; John and Anne Fear; John and Lisa Fuhrer; Mark and Sheila Loughborough; Gordon Tobey; Steven Tobey; and Lorne and Lynda Van Dusen **Ministry:** MOE **Proponent:** DEG Environmental Ltd. **Date Application received by ECO:** November 13, 2003 **Instrument:** C of A, s. 27, *EPA*	The applicants sought leave to appeal the decision to issue a C of A for a soil bioremediation facility. The grounds for seeking leave included the following: the site plan included in the application for the C of A is no longer valid because the parcel of land available has changed; estimates of truck volume by the applicants are higher than those provided by the proponent; access to the facility is along a 2-lane undivided highway that includes steep downhill sections and sharp curves so that trucks will pose a risk to other drivers, and the environment in the event of a spill; and no protection measures are included to prevent waterfowl from using the large holding pond which could become contaminated with hydrocarbons.	The ERT denied this leave to appeal application on the grounds that: the applicants failed to show how severance of a small part of the property affected the C of A; traffic issues are the responsibility of the municipality that approved the facility; no strong evidence was provided to prove that contaminants could enter the holding pond and cause an adverse effect on waterfowl and wildlife; and no evidence was provided that there may be health risks to the residents, nor that MOE failed to consider health risks. **Date of Leave Decision:** December 10, 2003	Leave to appeal denied

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry # IA03E0893 **Applicants:** Marchand Lamarre and Jodi McIntosh; and Trent Talbot River Property Owners Association **Ministry:** MOE **Proponent:** Thomas S. McCarthy & Barbara Ann McCarthy **Date Application received by ECO:** December 2, 2003 **Instrument:** C of A, s. 53, *OWRA*	The applicants sought leave to appeal the decision to issue a C of A for sewage works for quarry de-watering. The grounds for seeking leave included the following: a prior C of A issued and subsequently revoked for this quarry included a condition to deal with the risk that normal operation of the quarry may result in discharges causing long-term contamination of the property, but the current C of A does not include this condition; there are several potential sources of contamination including fuels, lubricants and solvents that could be spilled, and dust control chemicals; and the minimum information requirements set out in the MOE's "Guide for Applying for Approval of Industrial Sewage Works" were not provided to the MOE Director.	The ERT granted this leave to appeal application in regard to the issue of quantity and quality of the water entering the quarry on the grounds that it was unreasonable and premature for the Director to issue a C of A for sewage works without a valid PTTW in place because it is impossible to know certain facts concerning the de-watering regime for the quarry, such as the volume of water involved. This raised the possibility that an approval for a sewage works could result in significant harm to the environment. The ERT expressed concern that the multiple proceedings related to this quarry application might result in fractured hearings concerning the PTTW and the sewage works C of A. The ERT suggested that in the future any hearings should be heard concurrently. **Date of Leave Decision:** January 29, 2004	Appeal pending This hearing is scheduled to be held concurrently with the related PTTW hearing (see Registry # IA01E1063 above). On March 12, 2004, MOE filed notice of an application for judicial review of the ERT's decision to grant leave to appeal the sewage works C of A on the basis that the ERT: failed to apply or incorrectly applied the leave test under the *EBR*; erred in law in finding that no valid PTTW was in place; erred in fact and made a patently unreasonable decision in finding that no one had any way of knowing whether certain facts were correct with the PTTW in place when there was ample evidence on which to consider the sewage works C of A; and gave vague reasons for its decision and did not provide sufficient notice to MOE or other parties to allow them to participate in the hearing in a meaningful way. The application for judicial review is in progress.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry # IA01E0985 **Applicant:** Kettle Lake Campers Association **Ministry:** MOE **Proponent:** Weyerhaeuser Company Limited **Date Application received by ECO:** December 20, 2003 **Instrument:** C of A, s. 27, *EPA*	The applicant sought leave to appeal the decision to issue a C of A for a waste disposal site. The grounds for seeking leave included the following: the decision allows the insertion of more waste into an area that already has two municipal landfill sites in close proximity to five spring-fed kettle lakes; further concentration of waste will affect the aquifer that supplies the applicant's surface and deep-drilled water wells; the decision did not recognize the presence of homes and cottages in the immediate area; the decision does not require MOE to make scheduled inspections; and the decision does not require that information in the proponent reports to MOE be made public.	The ERT denied this leave to appeal application on the grounds that the concerns raised by the applicant were not supported by scientific, expert or other sufficient evidence and thus failed to meet the test for leave to appeal under the *EBR*. The ERT decided that MOE's decision to issue the C of A was reasonable. **Date of Leave Decision:** March 22, 2004	Leave to appeal denied

SECTION 8

EBR COURT ACTIONS

SECTION 8: *EBR* COURT ACTIONS
April 1, 2003 to March 31, 2004

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
Registry #CQ7E0001.P **Plaintiff:** Shirley Wallington Grace **Defendants:** Corporation of the Town of Fort Erie and the Regional Municipality of Niagara **Date Statement of Claim Issued:** August 22, 1997 **Type of Action:** Public nuisance action, s. 103, *EBR* **Court Location:** Superior Court of Justice, Welland	The plaintiff has begun a class action proceeding against her local municipality, which operates a municipal water system, and her regional municipality, which owns and operates the water treatment plant that supplies Fort Erie's water system. The plaintiff alleges that the water supplied to residents is frequently contaminated by iron rust and is also contaminated by microorganisms present at levels that exceed the Ontario Drinking Water Objectives and the Guidelines for Canadian Drinking Water Quality. The plaintiff claims that the contaminated water is a nuisance, and makes a number of other claims against the defendants. The plaintiff claims $30 million in damages and an injunction preventing the defendants from adding corrosion inhibitors to the water they supply.	Action pending. The plaintiff's class action certification motion was heard in the Superior Court of Justice in April and May of 2003, along with defendant motions for summary judgment. In July 2003, the court issued its decision refusing the plaintiff's motion for certification in this action, but ruling that there is a claim in negligence that can be advanced individually. The plaintiff did not appeal the decision not to certify the class action, so the class action in public nuisance will not be proceeding.

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
Registry #CQ8E0001 **Plaintiffs:** Karl Bracker, Victoria Bracker, Paul Bracker and Percy James **Defendants:** Her Majesty the Queen in Right of Ontario, 999720 Ontario Limited, and Max Heinz Karge **Date Statement of Claim Issued:** July 27, 1998 **Type of Action:** Harm to a public resource action, s. 84, *EBR* **Court Location:** Superior Court of Justice, Grey County (West Region)	The plaintiffs live next to property owned by the defendant Karge, located in Egremont Township in the County of Grey. The plaintiffs claim that the property is the site of an illegal waste dump and that substances emanating from the site are contaminating or will imminently contaminate the subsoil, groundwater, and surface water in the surrounding vicinity, including the plaintiffs' wellwater. They claim that the defendants are responsible for this contamination. The damages sought by the plaintiffs include: an injunction preventing the use of the property for any use other than rural uses; an environmental restoration plan to prevent, diminish or eliminate harm to a public resource caused by contaminants emanating from the waste dump and to restore the site to its prior condition; and damages in excess of one million dollars.	Action pending. Notice was approved by the court and placed on the Registry on December 23, 1999. The matter is still going through various pre-trial procedures and has not been listed for trial at this point.

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
Registry #CQ01E0001 **Plaintiff:** Wilfred Robert Pearson **Defendants:** Inco Limited, The Corporation of the City of Port Colborne, The Regional Municipality of Niagara, The District School Board of Niagara, and The Niagara Catholic District School Board **Date Statement of Claim Issued:** 2001/03/26 **Type of Action:** Public nuisance action, s. 103, *EBR* **Court Location:** Superior Court of Justice, Welland	The plaintiff maintains that the defendant has and does emit and discharge hazardous contaminants into the natural environment, including the air, water and soil of Port Colborne. The contaminants include oxidic, sulphidic and soluble inorganic nickel compounds, copper, cobalt, chlorine, arsenic and lead. The plaintiff claims that the defendant is liable for the activities at the refinery and the ongoing release of contaminants into the environment and onto the lands of the class members, based on the following causes of action: negligence; nuisance; public nuisance under s. 103 of the *EBR*; trespass; discharging contaminants with adverse effects under s. 14 of the *EPA*; and the doctrine of strict liability in *Rylands and Fletcher*. The plaintiff claims punitive and exemplary damages in the amount of $150 million, and compensatory damages in the amount of $600 million.	The certification motion was heard in June 2002. In a judgment dated July 15, 2002, the Ontario Superior Court of Justice dismissed the plaintiff's certification motion on the following grounds: the plaintiff failed to disclose a reasonable cause of action against the Region, the City or the Crown; there was no identifiable class; and a class proceeding is not the preferable procedure for resolving the issues found to be common among the class members. In September 2002, the Superior Court of Justice held the plaintiff liable for costs on the certification motion. The plaintiff and class members appealed this decision to the Divisional Court. In February 2004, the Divisional Court upheld the lower court's decision that it was not appropriate to certify this as a class action. The plaintiff has filed an application for leave to appeal this decision to the Ontario Court of Appeal, but the court has not yet indicated if it will hear the appeal. In March 2004, MOE agreed to an undisclosed settlement with the plaintiff, leaving Inco as the only defendant in the lawsuit.

SECTION 9

PROVINCIAL SUPPORT FOR AFFORESTATION AND PRIVATE FOREST MANAGEMENT - HIGHLIGHTS OF MORE THAN A CENTURY OF ACTIVITY

SECTION 9: PROVINCIAL SUPPORT FOR AFFORESTATION AND PRIVATE FOREST MANAGEMENT
HIGHLIGHTS OF MORE THAN A CENTURY

1871 – The Ontario Legislature passed *An Act to encourage the Planting of Trees along Highways* in response to the dust storms of summer and blowing snow in winter that could obscure visibility on highways and in rural areas.

1880 – The first Ontario government tree nursery established at Guelph. It would grow to become the primary source of free nursery stock to private landowners. In 1908, it moved to a larger location at St. Williams, Ontario.

1883 – The Ontario Legislature passed *The Ontario Tree Planting Act, 1883*. This legislation built on the Act of 1871 (above) by adding an incentive for the landowner – up to twenty-five cents per tree planted, paid for by the local municipality. The province helped defray the cost to municipalities by allocating fifty thousand dollars to the program. Municipalities could claim reimbursement for half of their costs. In 1896, the legislation was amended to allow boundary trees planted between lots to qualify for the bonus payments.

1905 – The Bureau of Forestry and Colonization was established, primarily to reforest desolate, abandoned farmlands.

1909 – The Department of Agriculture publishes *Report on the Reforestation of Waste Lands in Southern Ontario: 1908.* The report recommends tree planting on spent agricultural lands.

1911 – The *Counties Reforestation Act 1911,* enabled counties to pass by-laws for purchasing or leasing land for afforestation, but efforts proceeded slowly until 1921, when The *Reforestation Act 1921* was passed, creating greater involvement by the province in this activity. This legislation allowed the province to enter into agreements with counties to reforest and manage lands held by the counties.

1946 – The *Conservation Authorities Act* enabled the creation of Conservation Authorities (CA) within watersheds. CAs would become major participants in the province's afforestation initiatives. Also, the *Trees Conservation Act 1946* began the regulation of the management of trees on privately held lands.

1950 – The *Trees Act 1950* incorporated into one Act much of the early southern Ontario forestry legislation. It also provided municipalities with the authority to create tree management by-laws, e.g., cutting.

1966 – The *Woodlands Improvement Act 1966* allowed the Department of Lands and Forests (predecessor of MNR) to assist private landowners with afforestation and stand improvement.

1973 – MNR establishes the Managed Forest Tax Rebate Program in support forest management on private lands.

1997 – MNR creates the Managed Forest Tax Incentive Program to replace the MFTRP which had been discontinued in 1993. MFTIP comes into effect in 1998.

1998 – The *Forestry Act, 1998* incorporated elements of the *Trees Act* and *Woodlands Improvement Act*. The *Forestry Act* allows for municipal by-laws regulating destruction of trees and forestry practices. The *Woodlands Improvement Act* was rescinded.

2001 – Key woodland management authorities for southern Ontario municipalities are placed under the *Municipal Act, 2001*. For example, tree by-law articles were removed from the *Forestry Act* and incorporated into the *Municipal Act, 2001*. The definition of "good forestry practices" remained in the *Forestry Act* and is referenced by the *Municipal Act, 2001*.

SECTION 10

CHRONOLOGY OF CHANGES TO PROVINCIAL LAWS AND POLICIES ON REFILLABLE SOFT DRINK CONTAINERS, 1960 – 2004

SECTION 10: CHRONOLOGY OF CHANGES TO PROVINCIAL LAWS AND POLICIES ON REFILLABLE SOFT DRINK CONTAINERS, 1960 – 2004

Introduction

To provide background to the *EBR* application for review submitted on refillable soft drink containers (see pages 131-134 in this year's annual report), staff at the ECO undertook research on the history of Ontario's legal and policy initiatives on refillable soft drink containers (SDCs) and the Blue Box system. A partial chronology of past government initiatives appears below.

Partial Chronology of Changes, 1960-2004

1960 – Vance Packard suggested in his 1960 analysis of American commercial culture, *The Waste Makers*, that speed, convenience and disposability had become increasingly important to many consumers. In the 1950s and 1960s, disposable products grew in popularity. In part, this reflected a shift in attitudes and values in the wake of World War II. People began to consume more beer, soft drinks and other beverages in their own homes and less at restaurants, taverns and soda pop counters of drug stores.

1962 – Soft drinks were packaged and sold in steel cans for the first time in Ontario. Prior to 1962 all soft drink containers sold by Ontario retailers for off-site and home consumption were in refillable glass bottles. By the mid 1960s Ontario soft drink brand owners began to build strong relationships with the steel industry and large canning companies which had developed efficient canning methods for soft drinks. Together these companies began to gradually increase the proportion of non-refillable, deposit-less containers in the marketplace, primarily by substituting steel cans for refillable 10 oz. glass bottles.

1970 – Litter problems began to grow in urban and rural areas of Ontario, and strong links were made to the growing popularity of deposit-less steel cans. The Ontario government appointed consultative, advisory bodies such as the Littering Control Council of Ontario to respond to public concerns about litter.

1971 – Refillable soft drink containers accounted for 55 per cent of total sales in Ontario. The balance were non-refillable steel cans and glass bottles.

1974 – Environmental groups began to advocate establishment of a fully refillable deposit/return system for distributing soft drinks to reduce litter, conserve energy, protect the environment and promote local bottling. Pollution Probe established a "Pop Posse" in the mid 1970s; these activists roamed grocery stores looking for retailers who were violating the spirit of anti-litter campaigns and promoting sales of non-refillable steel and glass soft drink containers.

October 1976 – The ruling minority government decided to pass amendments to the *Environmental Protection Act* ensuring that refillable soft drinks would be available in all stores, banning non-refillable 1.5 litre bottles and providing a range of regulation-making powers to Cabinet. In addition, O.Reg. 687/76 was passed; if fully implemented, this regulation would have required the gradual phase-out of non-refillable SDCs by 1981.

Nov. 1976 – The phase-out proposal evoked a strong response from the soft drink brand owners, industry associations and other interest groups. At the Ontario government's request, the Ontario Waste Management Advisory Board (OWMAB) agreed to hold public hearings on the regulations in November 1976. The OWMAB received 35 formal submissions, including one from the Metal Container Manufacturers' Advisory Council (MCMAC). In its brief, MCMAC stated that if the regulations were implemented more than 1,200 jobs in steel can making would be lost, and capital facilities worth more than $50 million owned by companies involved with soft drink can manufacturing would be abandoned.

1977 – The Ontario government came to a "gentlemen's agreement" with the soft drink industry and local bottlers that required them to sell at least 75 per cent of their product (by volume) in refillable bottles rather than cans. This was one of the first voluntary agreements on an environmental policy issue ever reached between a government ministry and industry in Canada. The agreement was premised on increased sales of heavy, refillable 1.5 litre glass bottles. By March 1978, the Ontario Soft Drink Association (OSDA) was able to take out a full-page ad in the *Toronto Star* proclaiming that the soft drink industry, with the support of the public, had reached a refillable/non-refillable sales ratio of 72 per cent.

June 1979 – The federal Department of Consumer and Corporate Affairs banned 1.5 litre refillable bottles since they sometimes exploded when dropped. By this time, these containers represented approximately 25 per cent of refillable sales. To ease the hardship that this ban might cause for small bottlers, the MOE relaxed enforcement of O.Reg. 687/76 and overlooked the voluntary agreement it had negotiated with the OSDA to sell 75 per cent of its product in refillable SDCs. Sales of non-refillable SDCs quickly jumped above 40 per cent.

1981 – The Ontario soft drink industry announced that it had solved the breakage problem of the 1.5 litre glass bottles, but by this time consumer and industry interest in these bottles appears to have collapsed, partly because of the growing popularity of non-refillable polyethylene terephthalate (PET) 2-litre bottles.

1983 – The Recycling Support Council, made up of Alcan, Twinpak Inc., a manufacturer of PET bottles, Consumers Glass, Domglas Inc and the Ontario Paper Co, was formed, and announced that it would provide one million dollars towards the cost of curbside recycling in exchange for changes in soft drink regulations to allow greater reliance on non-refillable SDCs.

May 1985 – MOE reported that 35 per cent of soft drink containers sold by Ontario retailers were refillable, down dramatically from 72 per cent eight years earlier.

July 1985 – To resolve conflicts between the various interests about SDC recycling and refillables, a multi-stakeholder consultation process was established by the Ontario government in 1985, chaired by a law professor. In this case, the former executive directors for Pollution Probe and the Recycling Council of Ontario (RCO) agreed to represent environmentalists. Groups like Pollution Probe and the RCO had been advocating recycling of newsprint, metal and glass for several years and using valuable materials like aluminum for SDCs to subsidize curbside recycling programs seemed like a way to break the economic barriers that had been encountered.

August 1985 – Participants involved in the multi-stakeholder consultation agreed to relax the refillable quota to 40 per cent, that is, down from 75 per cent, if the soft drink industry contributed $1 million to help set up Ontario Multi-Material Recycling Inc. (OMMRI) and expand Blue Box curbside recycling programs. Eventually the amount of the OSDA's contribution to OMMRI was increased to $20 million over a four-year period from 1986 to 1990. Most of the stakeholders involved in the 1985 consultations believed that, over time, curbside recycling systems would achieve levels of environmental performance that were comparable to refillable systems. In addition, the Recycling Advisory Committee (RAC) was established under O.Reg. 623/85 (the Container Regulation, now Reg. 340, RRO 1990) to advise the MOE on compliance with the refillable SDC regulations.

1988 – In R*egina v. Erie & Huron Beverages* the Ontario Court of Appeal decided that the Crown could not prosecute certain contraventions of the refillable SDC regulations under the quota provision of s. 8(1) of O.Reg. 623/85 (now Reg. 340).

Nov. 1988 – RAC recommended that the ratio for monthly refillable sales be lowered to 30 per cent, as Blue Box services were available to nearly half of Ontario's households.

March 1989 – The Ontario government announced two waste diversion targets for municipalities: 25 per cent waste diversion from disposal facilities (mainly landfills) by 1992 and 50 per cent by 2000.

June 1989 – The Ontario government imposed an environmental levy of five cents per container on non-refillable beverage alcohol containers (including beer cans) as part of its 1989 Budget.

Dec. 1989 – RAC requested that the Ontario government adopt an "interpretative compliance" policy, whereby soft drink producers and distributors had to maintain the capacity (i.e. manufacturing and bottling operations, equipment and glass bottles) to produce 30 per cent of their product (by volume) in refillable containers, rather than actually comply with a 30 per cent monthly sales quota for refillable SDCs.

April 1990 – According to MOE, only 10 per cent of soft drink containers sold in Ontario in late 1989 were refillable. The Ontario government accepted the RAC request that it adopt an "interpretative compliance" policy.

Sept. 1990 – A new provincial government was elected in Ontario. RAC was disbanded by MOE in the summer of 1990, and replaced by a new advisory committee called the Waste Reduction Advisory Committee (WRAC).

October 1990 – The new Ontario government demanded that the soft drink industry meet the 30 per cent refillable quota. Soft drink industry officials threatened to legally challenge any attempt by the newly-elected government to force the industry to meet the refillable SDC quota in Reg. 340. Distilleries threatened to move their bottling operations to the United States if required to use refillable containers for alcohol beverages.

Feb. 1991 – MOE announced that it intended to make running a Blue Box system a mandatory requirement for all municipalities. (See below, under March 1994 entry, for further detail.)

June 1991 – MOE began to negotiate with the soft drink industry and concerned stakeholders on a new long-term funding model for the Blue Box system.

May 1992 – In its 1992 Budget the Ontario government doubled the environmental levy that applies to all non-refillable beverage alcohol containers, including beer cans, to ten cents per container. Some companies and industry associations launched an aggressive newspaper ad campaign criticizing the Ontario government for killing hundreds of jobs making beer cans but failed to mention that thousands of jobs in bottling operations could be at risk. Subsequent data in press reports suggested that fewer than 200 jobs were directly affected by the increased levy on beer cans, and more than three to four thousand jobs in beer bottling operations were protected. The levy appears to have achieved its intended effect. In 1991, about 78 per cent of packaged beer sold in Ontario was in refillable bottles. By February 1994, refillable bottles claimed 92 per cent of the market and have continued to maintain approximately the same market share in the past decade.

November 1992 – The Grocery Products Manufacturers of Canada (GPMC) released its proposed "Packaging Stewardship Model". The GPMC represents 165 major companies that manufacture and market food, health and beauty, household and paper products sold through retail and food service outlets, including large grocery manufacturers such as Lever Brothers, Colgate-Palmolive, Nestle and Proctor and Gamble. At the time it was estimated that the current members are responsible for 80 per cent of the volume of sales through Canada's grocery retailers. These companies subsequently helped to establish the Canadian Industry Packaging Stewardship Initiative (CIPSI) in 1993.

1993 – Industry experts stated in press reports that in 1992 approximately two per cent of Ontario soft drink sales were in refillable containers.

Early 1994 – Coke and Pepsi shifted back to aluminum cans after using thin-walled steel cans for a number of years. The soft drink companies also simultaneously ended their "Top up" grant subsidy program whereby the soft drink industry paid municipalities a "top-up" grant for steel cans they collect in their Blue Box programs. These grants were intended to compensate municipalities for the fact that the collection cost for steel cans exceeded the market value of the steel, which was pegged between $70 and $80/tonne in the early 1990s.

March 1994 – MOE passed O.Reg. 101/94 and made running a Blue Box system or depots (for collecting and recycling non-refillable SDCs) a mandatory requirement for all municipalities with more than 5,000 residents.

June 1994 – MOE and CIPSI released a joint discussion paper and proposal on funding. According to the proposal, the packaging industry would pay no more than 15-20 per cent of the cost of managing recyclables collected in the Blue Box system. The Ontario Waste Management Association and other stakeholders stated in subsequent consultations on the proposal that, to meet Ontario's waste reduction targets, every item that consumers purchase must be covered.

Although the Ontario government reviewed and considered the proposal (and revisions of it) on several occasions in the mid 1990s, the joint MOE-CIPSI proposal was never approved and implemented.

Jan. 1995 – Toronto Environmental Alliance filed an *EBR* application for investigation with the ECO alleging that two soft drink companies had contravened Ontario's refillable SDC regulations. MOE's investigation determined that the regulations had been contravened but the ministry did not lay any charges.

March 1995 – Two Ontario residents applied for a review of the refillable SDC regulations. MOE agreed to review Regulations 340 and 357 in the broader context of overall program streamlining and planned to report its decision by early 1997. MOE finally completed its review in April 2003. (For the ECO's review of the application, see pages 131-134 in this year's annual report.)

Nov. 1995 – MOE announced it was withdrawing its funding support to municipalities for the Blue Box system at the end of March 1996.

June 1996 – In its 1994-1995 Annual Report, the ECO recommended that MOE either propose changes to the refillable SDC regulations or enforce the existing regulations.

July 1996 – In its public consultation paper on regulatory reform called *Responsive Environmental Protection* (REP), MOE said that Ontario's refillable soft drink container regulations don't work and should be scrapped.

May 1997 – MOE referred the issue of funding the Blue Box system and clarifying roles and responsibilities in the province's solid waste management system to the Recycling Council of Ontario. The RCO, in turn, assembled "a broad range of stakeholders to develop options to address product stewardship issues," specifically to address the sustainability of the Blue Box system.

1999 – MOE announced the establishment of the Waste Diversion Organization, which committed $14.5 million to help fund municipal Blue Box system and other waste diversion programs.

June 27, 2002 – The *Waste Diversion Act, 2002* received Royal Assent. The *WDA* creates Waste Diversion Ontario, a non-governmental agency responsible for developing waste diversion plans for a variety of recyclable, compostable and re-usable materials. The WDO replaced the Waste Diversion Organization. The first material designated by MOE for developing a waste diversion plan under the *WDA* was Blue Box waste.

April 2003 – MOE posted a proposal notice on the Environmental Registry stating that it intended to repeal the refillable SDC regulations (Reg. 340 and Reg. 357).

Dec. 2003 – MOE approved a funding mechanism for the BBS under the *WDA*

May 2004 – MOE directed the WDO to increase diversion rates for residential recyclables collected in the Blue Box system to 60 per cent by 2008.

June 2004 – A study of plastic bottle recycling in Canada prepared by CM Consulting for the Environment and Plastics Industry Council suggests that "away from home" generation accounts for 63 per cent of all PET beverage containers that are sent to disposal facilities or recycled. The study also notes that recycling in "away from home" locations (e.g., commercial establishments, parks, beaches, event venues, etc.) can be limited. The study estimates that only 31 per cent of plastic beverage and non-beverage bottles generated in Ontario in 2002 were recovered for recycling.

August 2004 – Refillable SDC regulations had not yet been repealed by MOE.

SECTION 11

UNDECIDED PROPOSALS

SECTION 11: UNDECIDED PROPOSALS

As required by Section 58 of the *EBR*, the following are the numbers of proposal notices posted on the Environmental Registry between April 1, 2003 and March 31, 2004 that were not decided by March 31, 2004. A detailed list is available from the ECO by special request.

	Policies	Acts	Regulations	Instruments
MOE	2	0	8	1,210
MEST	0	1	3	0
MNR	41	0	14	62
MTO	1	1	0	0
MMAH	5	2	3	52
OMAF	0	0	0	0
TSSA	0	0	0	12
MNDM	0	0	0	4
CBS	0	0	0	12
MOHLTC	6	0	0	0

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